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MR. CHARLES PHILLIPS AND THE COURVOISIER CASE.

Our readers, we trust, will pardon another reference to Mr. Charles Phillips's course in conducting the defence of Courvoisier. Since we first called attention to the subject, we have been requested by several of the most eminent members of the bar to publish *all* the articles of importance which have appeared on either side. So far as we were able, we have striven to comply with this request. But we have been embarrassed by two very serious obstacles. In the first place, the Law Reporter is of too limited a size to contain half of what has appeared in the influential journals of England on this question. In the next place, we have found great difficulty in procuring copies of the foreign newspapers in season for the printers. In consequence, we have not furnished as much as we could have wished, and what we have furnished has necessarily appeared in an extremely ill-digested form.

In this number we take the liberty of publishing the second article in the *Examiner*. This is even more severe than that which preceded it. Our readers will judge for themselves whether such severity was wholly called for. At any rate, we think that they will admit that this second article, even if more effective than the other, lacks somewhat of the dignity which would become a censor. The article is as follows: —

WHAT WE HAVE NOT DONE, AND WHAT MR. CHARLES PHILLIPS HAS DONE.

A partisan of Mr. Phillips twits us with the "significant fact" that we carefully abstained from alluding to Mr. Warren in our remarks a fortnight back. The omission is remedied below.

Another of our omissions has greatly grieved the *Standard*. We were to have defended ourselves at the expense of the reporters. But, exclaimed the *Standard* triumphantly, "The universal scapegoats, the reporters, cannot be charged with the invention of the calumny." Miserable and malignant libellers that we were, the outlet commonly open to the worst offenders was remorselessly shut against us. Mr. Phillips himself vouched for the accuracy of the *Times*, and for us there was nothing but to accept even the word of Mr. Phillips.

Perforce excepting, then, this frail voucher, and submissively turning to the "giant of the press, who can make and unmake reputations," we found enough in its damning report to unmake fifty reputations less crazy than Mr. Phillips's. Hereupon, up start half a dozen wigged letter-writers to declare they were present at the trial, and don't believe a word of the *Times*' report that makes against their friend, and Mr. Phillips claps their letters into a pamphlet to annihilate "an obscure journalist's" abominable libels. Call you this backing your giant of the press?

If the *Times* is to be believed, Mr. Phillips, to screen a murderer, with whose guilt he was acquainted, threw suspicions of the guilt upon the innocent, invoked to a falsehood the name of the omniscient God, grossly slandered a woman for the performance of a sacred duty, and accused the police officers of a "bloodhound" conspiracy to convict an innocent man for the money they would get by it. But if Mr. Richard Garde, barrister-at-law, is to be believed "upon his honor as a gentleman, and, what he considers far greater, his faith and word as a Christian," Mr. Phillips cast no guilt upon anybody, nor did he in the least depart from the strict rules of honor and truth; and Mr. Garde particularly claims credit for his memory in the matter, because of "the evident interposition of Divine Providence which brought the guilty to punishment"—in other words, because of the critical arrival of Madame Piolaine to undergo the slander of Mr. Phillips. In like manner Mr. James Espinasse, recorder of Rochester and judge of the Kent County Court, deposes that Mr. Phillips kept scrupulously within the bounds of propriety; Mr. M. Fortescue protests that Mr. Phillips did not utter a word to justify the imputations cast upon him; and Mr. Clarkson, as befits his impartial position in the affair, entirely and cordially confirms every statement in Mr. Phillips's letter.

These communications are so dated as to indicate the possibility of the writers' having seen the article in the *Examiner* of the 24th, though allusion to it is evaded; and we have ourselves received a letter from a barrister of the northern circuit, expressing strong approval of what we have said as to the license of counsel, but demurring to our inculpation of Mr. Phillips on the faith of an uncorroborated *Times* report:

"The report of Mr. Phillips' speech from which you quote, seems to me to have been made by a gentleman who was not a short-hand writer, or who, being a short-hand writer, was desirous of abridging the report of the speech. It is written in the *third*, not in the *first* person. The reporter is the speaker, not Mr. Phillips. He narrates what he (Mr. Phillips) said. He was, in changing the mode of expression from the first to the third person, necessarily compelled to vary his report from the *exact words* of the speaker; and if he either was a reporter who took his notes in long hand, or was desirous of condensing the report, it is highly probable that Mr. Phillips's words were not literally taken down; and it is quite obvious that a very slight transposition of words might alter the sense most materially."

We quoted the report indorsed by Mr. Phillips himself as a faithful one; but thus appealed to, and sensible how little worth was the learned gentleman's authority, we have thought it right to ascertain if the reports of the other morning papers suggest any better case for Mr. Phillips, or in any respect tend to confirm what he now brings his friends to depose to. And, first, for a few words of explanation upon two points in the evidence of the police at the trial.

The prisoner's trunk was twice searched after suspicion had fallen upon him, and, during the interval of a week between these examinations, had been left in the custody of the police. A pair of gloves very slightly marked with blood, which had not been detected at the first search, fell from the enclosure of a shirt when the trunk was examined the second time; and there was no reason to doubt, as the judge's charge suggested, that, if the shirt had been shaken on the first occasion, as it was on the second, the gloves would then have been discovered. But, one way or the other, the fact was of the smallest possible importance, the bloody marks upon the gloves, and upon two handkerchiefs which were found with them, being hardly discernible; and any such revolting suggestion as that the police had so stained them with blood of their own procuring, the chief justice quietly disposed of by remarking, that if such had been the design it must have been more successfully effected. The other circumstance to be premised is, that one of the constables, Baldwin, contradicted himself as to his personal knowledge of the reward for the discovery of the murderer. Confused and terrified under a long and bullying cross-examination, this uneducated man, ignorant and unable to read, fell into a confusion between denying that he had *read* the government offer of the reward placarded in the streets, and admitting that he had *heard it read* at the station-house. Upon these two facts, which we have thus simply stated, was to be built the entire superstructure of alleged conspiracy between the police and the maid-servants. Fresh from a careful reading of the case, we distinctly affirm that every part of the evidence of Sarah Mancer, and, with the single exception of Baldwin, of every member of the police, was upon the face of it honest and irrefragable testimony; and it is a matter of amazement to us, that the poor women-servants could have retained so consistent an impression as their evidence conveyed, of the frightful terrors they had undergone.

We have now compared the report of the *Times* with those of the *Chronicle* and *Herald*, (the *Post's* report was that of the *Herald*, with a

few unimportant printer's deviations,) and are in a position to state that they confirm, in a remarkable manner, every imputation against Mr. Phillips's speech, and only differ in the large additions they make to its profanity, its wickedness, and its falsehood.

The key-note of the oration is struck in the first few lines. The jury, according to the *Times*, are told that the orator will demonstrate, not only that there is nothing on which they can safely convict Courvoisier, but that there is a good deal "which might make them suspect that he had been made *the victim of an unjust and depraved conspiracy;*" or, according to the *Chronicle*, "that he is sought to be made *the victim of the greatest depravity.*" This was what Mr. Phillips undertook to put before the jury, and *did* put before them. Proceeding strictly upon the Brougham canon, and regardless of the alarm, the suffering, the torment, the destruction he might bring upon others, he denounced the police and the women-servants, throughout, as fellow-conspirators against the life of his client. Such a charge might also be so stated as to involve what would infinitely strengthen it; and this he did not omit. Imputations of a knowledge of the murder previous to Courvoisier's knowledge of it, were levelled at the servant girl who had passed the terrible night of its commission near the bedroom of the victim; and these the jury were left to couple with that cross-examination before the confession which Mr. Phillips now palliates on the ground of his client's supposed innocence, but of which his client's confessed guilt nevertheless received all the advantage.

Heretofore we have given these revolting imputations from the report in the *Times*. What we shall now quote is from the *Herald;* and the barrister of the northern circuit will be glad to learn, not only that the *Herald's* report is in the first person, but that it is throughout more full than that of his contemporaries, and has every appearance of verbatim accuracy.

Now the first imputation cast upon this man was the agitation he displayed. Let us try this by the test of our own hearts and consciences. Here he is, having seen his master perhaps in a state of repose, and in the morning he is alarmed *by the housemaid, who was up before him*, with an outcry of robbery, *and some dark, mysterious suggestions of murder having been committed.* "Let us go," said she, "and see where my lord is." Gentlemen, *I must confess that that expression struck me as very extraordinary.* If she had said, "Let us go and tell my lord that the house is plundered" — it would have appeared different. But *why should she suspect that any thing had happened to his lordship? She saw no stains of blood about the house, and why therefore should she suspect that his lordship was not safe?* Courvoisier and all the other inmates of the house were safe, *and why should she have suspected that her master had been injured?*

The language employed against the police appears also in ranker luxuriance in the *Herald* than in the *Times*. "A gang of villains, tempted by the 450*l*. reward," is the mildest description vouchsafed to them. They are "ruffians" tampering with every point of evidence "to fasten guilt on the wretched man at the bar." Their hands are "fangs." They do nothing that is not a "foul machination." "My learned friend asks *who murdered his lordship?* I ask *who put the bloody gloves and the bloody handkerchiefs into the box of the prisoner? I say openly and fearlessly, that*

the articles were placed there by some of the police, for reasons best known to themselves." So far the *Herald*. The *Chronicle* goes further. The police are "miscreants" laboring to "condemn and damn" the prisoner, whose box has been left purposely accessible to the "whole gang" and to the maid-servants. The wretches who hid the gloves in the prisoner's box, are wretches who had an equally good opportunity of concealing the articles in the prisoner's pantry. In other words, as the chief justice stated it to the jury, the police must in that case have removed and concealed these articles (which had been in their place late on the night before the murder) at the very instant of their discovery of the crime, and before suspicion had fallen anywhere. "Who put the gloves in the box?" asks Mr. Phillips repeatedly. "I told you before, that there was evidence to induce a supposition *that this man is sought to be made the victim of a foul contrivance.* Tell me how the gloves got into his box. · · · *Who put these things into the trunk, I ask, and for what purpose were they put there?* · · · Was it any thing but an act of justice to the man WHOM, I SAY THE CONSPIRATORS SEEK TO MURDER, that this box should have been locked up and sealed?"

It was the same at every step of the evidence. Every thing was wrested and perverted to the foul work in hand. A very respectable man, named Pearce, a police inspector, to whose character and evidence the chief justice was careful to bear testimony in his charge, admitted that on the sudden discovery of the articles concealed by Courvoisier he had shown them to the latter, and asked him if he now "dare look him in the face." Mr. Phillips seized upon this as a proof of intimidation. "MERCIFUL GOD, gentlemen!" says the report in the *Herald*, "was this an expression to be used by an officer of justice *to an unfortunate man?*" The inspector is denounced as an "inquisitorial ruffian," who "browbeats" and "bullies" for his share of the plunder. "Yes, gentlemen of the jury, *the money is to be divided upon the coffin of my unfortunate client*, should you pronounce him guilty, and Mr. Inspector Pearce, and the rest of the police myrmidons, will, when they receive their respective shares, *write the receipt in the blood of the prisoner.*" Incredible as are these expressions in the report of the *Herald*, they are more than confirmed in that of the *Chronicle*, which represents Mr. Phillips deploring, in deep pathos, the return of the days of "blood-money," and denouncing the crime of the government reward (which he attributes to a desire of Lord John Russell to avenge his relative's death) as having "*induced men to compass the death of their fellow-creature.*" Both reports unite in affixing such epithets as "miscreant bloodhound" to the constable Baldwin, and in applying his solitary self-contradiction to the "whole villanous gang." "*Ex uno disce omnes*," exclaims the conscientious advocate.

The blasphemous invocations to the Deity are less frequent in the *Chronicle* report than in that of the *Herald;* but in both they are sufficiently rife. "THE GOD ABOVE ALONE KNOWS WHO IS GUILTY OF THE TERRIBLE ACT of which the prisoner stands accused," is one of many similar expressions in the *Herald* report; and the suggestion of the minor guilt of robbery thrown out to meet that evidence of Madame Pilaone, which no amount of personal slander could shake or evade, is here accompanied with language

more disgustingly profane than even in the *Times*. "You are asked," says this advocate, whom the pious Mr. Garde so much admires,

to find the prisoner guilty of the crime *upon circumstantial evidence. Are there then no circumstances against other parties in connection with this case?* You are to recollect that if you find this man guilty you doom him to death upon mere circumstantial evidence. I shall be able to show you by and by that you can WITHOUT PUTTING YOUR SOULS TO ANY HAZARD find him guilty of an offence by which he will be liable to punishment little short of that to which he would be consigned even if he were found guilty of the dreadful crime of murder, *and this you may do* WITHOUT HAZARDING YOUR OWN SALVATION.

Does Mr. Richard Garde, meek Christian that he is, think such language as this is to be approved without "hazard to *his* salvation?" A letter from the holy man to the *Examiner* on this point would be really much more edifying than his recent letter to Mr. Phillips.

The foul case we have thus doubly and trebly established, is not capable of further addition; but the friends who have admired the speech for its "powerful and eloquent appeal to the heart and judgment of the jury, affecting, in a most wonderful manner, all who heard it, particularly the educated," would doubtless charge us with a wicked suppression if we omitted its affecting peroration. Here it is, then, from the *Herald*.

And now, gentlemen, having travelled through this case of mystery and darkness, my anxious and painful duty is ended. But, gentlemen, yours is about to commence, and I can only say, the Almighty God guide you to a just conclusion. The issue of life and death is in your hands. To YOU IT IS GIVEN TO CONSIGN THAT MAN ONCE MORE TO THE ENJOYMENTS OF EXISTENCE AND THE DIGNITY OF FREEDOM, or to send him to an ignominious death, to brand upon his grave the awful epithet of murderer. Gentlemen, mine has been a painful and an awful task; but still more awful is the responsibility attached to the decision upon the general fact or circumstances of the case. *To violate the living temple which the Lord hath made — to quench the fire within his breast, is an awful and a terrible responsibility;* and the decision of guilty once pronounced, let me remind you, is irrevocable. Speak not that word lightly — speak it not on supposition, however strong — upon conviction, however apparently well grounded — upon inference — upon doubt — nor upon any thing but the broad, clear, irresistible noonday conviction of the truth of what is alleged. *I speak to you as a friend, as a fellow-Christian*, and I tell you, that if you do not act in the spirit which I have called upon you to do, THAT THE DEED OF TO-DAY WILL NEVER DIE WITHIN YOU. If you should pronounce your decision without that deep and profound consideration of its awful import, the error which you have fallen into WILL PURSUE YOU WITH REMORSE TO THE LATEST PERIOD OF YOUR EXISTENCE, AND STAND AGAINST YOU IN CONDEMNATION BEFORE THE JUDGMENT SEAT OF YOUR GOD. SO BEWARE WHAT YOU DO.

Now let the reader pause a little to consider that the man in whose behalf this passionate and profane appeal was uttered, was known to the man who uttered it to have murdered a venerable nobleman as he lay sleeping in his bed. Let him reflect that all the pains and profligacy of assertion which our extracts have disclosed, involving the innocent in fearful suspicions, damaging the character of honest witnesses, destroying the efficiency of public officers, and lessening every social safeguard against

the immunity of crime, had for its avowed object nothing less than to "restore once more to the enjoyments of existence and the dignity of freedom" a confessed and cowardly assassin. Let him not forget, at the same time, that this speech had been bought and paid for; and after his best judgment let him say *who* was the bloodhound in the case, and *what* was the blood-money.

Such devotion to the client as this has no parallel in any other relations of man and man; and the bond of it is a bit of gold, buying off, if need be, truth, honor, humanity.

> I ask not, I care not, if guilt 's in thy heart,
> I know that thou *fee'd* me, whatever thou art!

Yet there was a moment when Mr. Phillips, forgetting the highest duties of an advocate, had thought of throwing up his brief, and of throwing up much beautiful bombast along with it. Naturally it was a moment of great horror to the orator. It struck him dumb. His client had committed a double assassination; he had not only murdered his master, but worse, he had murdered also, by his inopportune confession, his counsel's prepared speech. How many aspiring flights must be modified at last! how many appeals and protestations reduced from the affirmative to the negative. Yet much was saved, after all, as we see. Some of the worst parts of the prepared matter came into play, for want of other and better resources; but the first dismay at the derangement could not have been lessened by the anticipation of that beggarly makeshift. Mr. Phillips had two things to do, to save the confessed murderer, and to save his own innocent speech, and his exertions in behalf of both were strenuous.

I was to speak the next morning. But what a night preceded it! Fevered and horror-stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away; now muttering his awful crime, and now shrieking to me to save his life. I did try to save it.

And remarkable it is that most of the professional testimonials which Mr. Phillips now publishes, anxious as the writers are to exculpate their friend, dwell instinctively with special praise upon the extraordinary zeal with which he defended the murderer. Mr. Garde, who deposes on his faith and word as a Christian, describes it as "a most powerful and eloquent appeal to the *heart* and judgment;" and Mr. Espinasse characterizes it "as earnest and energetic, and addressed to the jury with that zeal and eloquence which your duty as an advocate required, but beyond which you did not go."

To many minds this unabated zeal and energy must seem very wonderful, owing their existence to the poor pelf of the fee. To minds unprofessional, perhaps the handsomest testimonial which Mr. Phillips could have produced would have been one setting forth that some cooling of his usual zeal and earnestness had been detected upon the occasion in question; but Mr. Garde and Mr. Espinasse regard as admirable the manifestations of zeal on behalf of an assassin, which a knowledge of his guilt had not diminished a jot.

And what is the essential difference, in point of sentiment, between aid-

ing and assisting by such means in the escape of an assassin from the hands of justice, and aiding and assisting in his escape before he falls into the hands of justice? In respect of feeling, how is the advocate who uses all his powers without scruple to procure the acquittal of a murderer, distinguishable from an accomplice after the fact? We know how Mr. Phillips would act if a wretch accosted him with the red hand, saying, "I have just cut my sleeping master's throat, help me to escape from the pursuit of justice, and here are five blood-stained guineas for the service:" and in point of sentiment, how is the case altered when the escape desired is from the verdict of a jury, instead of the hands of the police? No one would pass a night of horror because an assassin had implored him to save him from the punishment due to his crime. Humanity would turn from the appeal to the thought of the murdered victim; sympathy would be with the sufferer, not with the cut-throat. But the fee and professional rule, in the judgment of Mr. Phillips and his friends, reverse all this. According to professional rule it can be understood why it was that Mr. Phillips continued the defence of his client after confession of his guilt; but minds not professional may yet marvel that abhorrence of the pepetrator of such an enormity did not somewhat cool the fervor of his zeal for his client, and abate the earnestness upon which he is so complimented by the contributors to his pamphlet-testimonial. The only auswer is that all his sympathies and all his faculties were bought and paid for; that he was hired for the job of effecting a cut-throat's escape; and that he belonged for the nonce, morally and intellectually, out and out, to the assassin.

With exactly this defence, our contemporary the *Standard* has for a third time advanced to the rescue of Mr. Phillips. Twice it made the attempt since our article of the 24th, and twice fled ignominiously. But on Thursday night it again took heart, fairly came up to the ditch in which its friend lay, and plunged in beside him. To compare the *Standard's* article to any thing but Mr. Phillips's speech, would be an injustice. It is a defence *a la Courvoisier;* and no other epithet would describe it. It is a series of gross untruths.

The *Standard* begins by saying, that we meditate a retreat from the charges we have made. This is untruth the first — staring and unblushing. The *Standard* proceeds to say, that we have been signally exposed in our unjust charges. This is untruth the second; and, moreover, a mere, brazen imitation of Mr. Phillips himself, when he told the readers of his pamphlet, that we have been "effectually crushed," "that he has a profound sense of the generous and noble" response made to his appeal, and that his case has been accepted as "that of every man in the community out of whose character any anonymous defamer may carve a dinner." Both Mr. Phillips and the *Standard* know perfectly well that the partial verdict obtained upon a series of Old Bailey evasions has, since, been reversed. They have read that honorable reversal in the *Spectator* of last week. It has been echoed from every able or influential quarter in the provincial press. It has stung them in the sharp comments of *Punch*. It has been conveyed to them in the name of the respectable part of the profession, and through the mouths of honorable practitioners, by the *Law Times*. And they have winced under it, in the calm and able reasoning of the *Morning Post*.

The *Standard* states, that we originated, for personal motives, what it calls the libel on Mr. Phillips. This is its third untruth. It knows well that Mr. Phillips's speech had been the subject of general remark during the week succeeding the trial, and before the *Examiner's* remarks were published. It cannot wholly have forgotten the surprise and indignation excited, or that this found expression in the highest as well as humblest places. Even the Bishop of London denounced what Mr. Phillips had done as inconsistent with Christian morality, and was answered, in his place in the house of lords, by Lord Brougham.

The *Standard* supports its imputation of a personal motive in our statements against Mr. Phillips, by the assertion, that we have shifted the ground of our accusation. This is its fourth untruth. We have sustained what is called our accusation, in every respect. Inveterate habits of the Old Bailey cleave to Mr. Phillips; and in the statement of the charge, in his letter ("The trial terminated on Saturday. On Sunday, I was shown, in a newspaper, the passage imputed to me. I took the paper to court on Monday," &c.) he very possibly intended a covert and false allusion to the *Examiner;* but the *Standard*, when it repeated this sorry trick, had read the article which exposed its falsehood, and knew that it was not till a week after the trial we adverted to the subject in any way.

The fifth untruth of the *Standard* is, that our "frightful charge" has dropped into a "complaint;" but this notable averment must be set forth *ipsissimis verbis*, and with its own *italics*. For here, at last, we plainly see defendant and defender in the ditch together.

Driven from its first "fib," the *Examiner* resorted to another more venial ground of accusation, but one that is sufficiently absurd, namely, a complaint, that in defending Courvoisier Mr. Phillips labored to cast a suspicion upon the servants in Lord William Russell's house, and upon certain policemen. Now, if so instructed by his brief, Mr. Phillips *was bound to take this line*, and he might take it the more freely because the injury to the parties transiently reflected on *could be but temporary;* a verdict of guilty against the prisoner at once exonerating them; and, even in case of an acquittal, when the life of his client should be no longer in jeopardy, a less high-minded and candid man than Mr. Phillips would be sure to do full justice to those whom, upon the authority of his brief, he for a moment misrepresented.

Mr. Phillips received his brief before the confession; and if, after the confession, he was bound to take the same line of defence for a guilty client which had been prescribed in behalf of a client supposed to be innocent, there is an end of the whole matter in dispute. We assert that the obligation is specifically the other way; and it is for the profession itself to give authority to that assertion, and to stigmatize as the *Standard's* worst untruth the averment, that the general body of the profession has any other "recognized rule."

Our contemporary makes light of a few damaged reputations of the innocent in the scale against acquittal of the guilty. Forsooth, it is "a quickly passing cloud over the character of two or three persons." Where character and conscience have been seared at the Old Bailey, it is very possible that such clouds pass lightly away; but there are exceptions, and Sarah Mancer was one. The cloud was heavy over her; and it passed so

slowly that her life never more escaped from it. She died in a madhouse. "I saw this poor woman," says a correspondent who was present during the trial, (for we, too, have had our written testimonials, though we have not yet made a pamphlet of them,) "I saw her, pale, breathless, and trembling in every fibre of her frame; though I did not fail to mark, at the same time, her glance of conscious innocence and noble scorn, while the advocate was thundering forth denunciations against her." Of course Mr. Garde, Mr. Espinasse, and the rest, saw nothing of this. They were busy admiring the ingenuity of the rack, and had no leisure to notice the victim quivering beneath it. Yet, for even the well-practised nerves of Mr. Adolphus the torture by his fellow-practitioner was carried too far. He was an honorable and kind-hearted, though an irritable man; and his testimony in the case is not the less worth because he happened to hold the brief for the prosecution. His account of the trial was embodied in the terse remark, that the murder had been matter of *inquiry* against the prisoner, and of *assertion* against the witnesses.

Such assertion, says the *Standard* at last, was perfectly right and allowable. Then, why with such vehemence assail the *Examiner?* Our worst offence is, to have branded Mr. Phillips ineffaceably for having, without shame, resorted to it. The *Standard*, hopeless of clearing its client, covers itself with the same moral dirt, and protests it of excellent savor. Be it so; — but there is still at issue, the claim of a great profession to be esteemed honorable, as it is known to be intelligent and dignified; and it will behoove its leading members, if they would not share the uncleanliness of Mr. Phillips and his friends, to disavow their doctrines and their practice.

To a man of ordinary and unprofessional common sense, the rule of Lord Brougham, openly affirmed by the *Standard* to be the rule of every living "judge and lawyer," appears really much too absurd to be as wicked as it assumes to be. Mischief, as *Mr. Jonathan Wild* says, is a precious commodity to waste; and such a profligate waste as the blackening of a few innocent people for the clearance of every guilty one, would speedily put a purpose into the jury-box more than a match for the foulest tongue. But the artful introduction of distinguished names into Mr. Phillips's shabby evasion of the charge brought against him, has given a shock to the feeling of security on this head; and a suspicion is awakened which it will not be wise to disregard. It has never been doubted, that the bar had its bravoes as well as its heroes; but never did the two classes run such danger of being confounded as at present. The proper administration of criminal justice concerns every individual nearly; and the public cannot safely be left with the impression, however erroneous or hastily formed, that a criminal in the dock may be defended by only less great a criminal out of it, and the presiding judge sit insensible to the new wrongs thus inflicted in addition to the old.

In our belief, advocacy exists for nobler uses than this, and its generally beneficial exercise is secured by the high character of our judges; but not the less, since certain questions have been raised, is it fitting that they should be met explicitly, and not be suffered to let drop till the answer is fairly given.

The Examiner of the same date contains the following article. In order to "complete the record," we publish it. It is very smart, and we must not be understood to deny the justice of its strictures; but we think that its flippancy and bitterness hardly correspond with the position which the writer in the Examiner would fain assume.

WARREN'S WHITING.

Time was when the name of Warren was indissolubly associated with blacking. Every dead wall presented in huge letters the counsel, "Try Warren." The same name is now connected with a very opposite business to that of blacking, and the words "Try Warren" will be understood as recommending recourse to the ingenious reviver of the ancient experiment of washing the blackamoor white. The association is no longer Warren and jet black, or japan, but Warren and snow white, Warren and Phillips. The blacking-man is utterly eclipsed. His name is gone, merged forever in that of the professor of the whitewashing line of business, whose work, the very antithesis to that of his celebrated predecessor, is utterly bootless.

Try Warren, say we, with all our hearts. Try Warren, M. Cabet, on the Red River; try Warren, M. Louis Blanc; try Warren, Mr. Feargus O'Conner; try Warren, Mr. George Hudson; try Warren, Mr. Joseph Ady. Let no one in the dirt despair. See what the artist has done for Mr. Courvoisier Phillips, who has been nine long years in the mire, and who is now, according to his own account, made clean, and not only content but self-glorious. What disinfecting or deodorizing fluids are to be compared with Warren's matchless specific! Upon this matter we must needs take Mr. Phillips's own evidence. If he is satisfied with Warren's treatment, and its results, who else has reason to complain! Certainly we have not. We feel to Warren as Boniface did to the gentleman who presented his wife with a dozen of usquebaugh, of which the good woman in due course died, "but," says mine host, "I thank the gentleman for what he did all the same."

Foreigners observe that nothing is done in England without a dinner, and in the history of the late expurgation of Mr. Courvoisier Phillips we have a remarkable exemplification of this truth. All comes of Mr. Warren's having dined with Lord Denman. If Mr. Warren had not dined with Lord Denman, he would not have had the opportunity of mentioning to Lord Denman the report to the discredit of Mr. Phillips, and he would not have heard from Lord Denman that the charge was unfounded, as he, Lord Denman, had spoken on the subject to Mr. Baron Parke, &c. &c.

So that Warren's whiting all comes out of this dinner, and the moral is that great men should ask Mr. Warren to dine with them, that out of his dining with them good may come, for so it is that out of evil cometh good. We say, therefore to chief justices and such like, try Warren, as well as to Louis Blancs and Hudsons. They will not throw their bread

vainly on the waters; it will come back to them after many days, and they will see the dinner handsomely proclaimed to the whole world, and the host duly commended for nicety in all fine qualities, as well as he is proved to be in his choice of company.

There is, indeed, but one fault to be found in Mr. Warren's account of how he was moved to put Mr. Phillips on his new trial, and that is a matter of fact. Mr. Warren says, "Some time ago I was dining with Lord Denman." The nonchalance, the ease of the mention is graceful, but there is something not so pleasant in the "some time ago" — why some time ago? why not as Hamlet has it, rather, "his custom in the afternoon?" He might almost as well or as ill have said, "Once upon a time I was dining with Lord Denman." What we wish to impress is, that as this dinner with Lord Denman was so pregnant with consequences to the honor of the bar, such dinners ought to be of more frequency to enable Mr. Warren to make the right profit of them. Mr. Phillips talks of carving a dinner out of a character, but his friend Mr. Warren has performed the opposite operation of carving a character out of dinner; but this can only be done out of such dinners as chief justices, chancellors, and the like, give to deserving lawyers. As they say in the East, may they never be less!

The end of all this is that Mr. C. Phillips has published, in the shape of a pamphlet, an account of the process by which he has been washed white as wool, in his own view, through the agency of Mr. Warren, under that lucky dinner of Lord Denman. It is not for us in this place to sit in judgment whether Mr. Phillips has or has not reason for his entire content and measureless satisfaction. We shall not inquire here whether there has not not been some mangling as well as washing, nor scrutinize the complexion with which the article comes from the scrubber's hands. The blackamoor in the fable, under the hands of the first Warren, did complain before he died of the kindness; Mr. Phillips does not complain, but we are not to place him in the class described by Junius as infamous and contented. When the Duke of A. and the Marquis of B. write letters testifying to the cure of their corns, it is not our habit to dispute their testimony or controvert their pretensions to pedal ease. Mr. Phillips advertises himself as cured by Warren of a bad repute of nine years' standing. As the sick Frenchman said to a friend, complimenting him on his healthy appearance, "Mais, vous n'êtes pas difficile, mon ami." But that is not our affair in this place, where we take the counsellor at his own showing.

Fault has been found with his not sooner attempting his vindication; but to this in candor it must be observed that the period is precisely that which according to critical rule is held requisite for the gestation of the greatest work of invention; and besides, as Mr. Phillips ingeniously explains, the calumny has harassed his friends far more than himself, which was a reason for not minding it; for surely a gentleman may command philosophy enough to bear the vexation of his friends for nine years, provided the annoyance to himself is comparatively small. Why at last Mr. Phillips consented to put his friends out of their pain does not after all very clearly appear, the malignant libels having been circulated against him

only by an obscure journalist, and Mr. Phillips, as he explains in his preface, having the fear that he has set a bad precedent to the bar in replying to calumnies inflicted upon them in respect of their public professional conduct. But this bad precedent he has set through the persevering solicitude of friendship — the friendship which, so long as it was harassed more than he was by the attacks, he stoically left to its sympathetic pains for nine long years.

The pamphlet before us is composed of the Warren intervention induced by the Denman dinner some time ago, the epistle of Mr. Phillips to the *Times*, and an appendix of testimonials to the completeness of the cure of reputation, such as we are in the habit of seeing quoted in proof of the marvels of Holloway's Ointment, or the virtues of Rowland's Macassar Oil. Few corn doctors can produce more worshipful names in certification of what they have done. Nay, the great Hudson testimonial itself is rivalled. It is a pity, however, that Mr. Phillips was not able to number amongst them some opinions from unprofessional minds, as the question is not simply whether his conduct accorded with professional ideas of an advocate's license or accord with morality. It is very possible that Mr. Garde, Mr. Mahon, Mr. Espinasse, Mr. Mellor, Mr. Fortescue, Mr. Clarkson, and Mr. Flower, would do all that Mr. Phillips did to procure a murderer's acquittal; that they would endeavor to shift the suspicions of the guilt on the innocent, and protest that none but the Almighty God knew who perpetrated the murder, with the knowledge in their own minds of the falsehood of the profane asseveration. That they would do what they approve is to be inferred, and the conduct they approve is to be seen in the report of the *Times*, admitted to be faithful by Mr. Phillips. But this does not advance the settlement of the real question a jot, whether such practice is accordant with morality.

Mr. Phillips takes as motto to his pamphlet Lord Brougham's statement of the duties of an advocate, but strangely omits the part which makes it so applicable to his own conduct. He quotes it thus:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means; to protect that client at all hazards and cost to all others, and among others to himself — is the highest and most unquestioned of his duties.— *Lord Brougham.*

— leaving out the very conditions of professional conduct he himself so signally illustrated, — "he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other."

This doubtless is referable to modesty, Mr. Phillips shrinking from displaying how completely the highest duties of an advocate as defined were discharged by him in the case of Courvoisier, "to the suffering, the torment, the destruction" of the innocent. As we learn from so eminent an authority what are the advocate's highest duties, it would be extremely desirable to have also a view of the lowest, in order to take the altitude of the professional morality. What must be the depths when such are the heights! A gibbet should serve as the standard of measurement. Its proud summit must be level with the heights defended.

We are sorry that Mr. Phillips has vowed to make no rejoinder to any reply to his letters — not but that we commend the prudence of his resolution, proceeding on the discreet maxim in such cases, "The least said the soonest mended," but as it deprives us of certain explanations or interpretations we require at his hands. The truth is, that we are not very well skilled in the Irish tongue in which Mr. Phillips writes, and we have endeavored in vain to construe the very third sentence in his preface. We quote it with the context, in the hope that some friend may be able to explain to us what the writer means to say :

Nothing but the persevering solicitude of friendship could have induced me to set, as I fear I have done, a bad precedent to the bar in replying to calumnies inflicted upon them in respect of their public professional conduct. *It seems to me intolerable that the sanction of an honorable profession must be required to recognize the existence of such a right as is contended for.*

To put this into intelligible sense will be no bad Christmas puzzle.

And there is another matter that perplexes us much. It is a small point to be sure, but in looking at evidence small points are often of much significance.

Mr. Phillips gives this account of a conversation that passed upon his putting the question to the judges who presided at the trial, whether he had appealed to Heaven as to his client's innocence :

"You certainly did not, Phillips," was the reply of the late lamented lord chief justice, "and I will be your vouchee whenever you choose to call me." "And I," said Mr. Baron Parke, happily still spared to us, "had a reason which the lord chief justice did not know for watching you narrowly, and he will remember my saying to him when you sat down, '*Brother Tindal*, did you observe how carefully Phillips abstained from giving any personal opinion in the case?' To this the learned chief justice instantly assented." This is my answer to the second charge.

Of course Mr. Phillips speaks by the card in his recollection of so remarkable a conversation ; but how strange is it that Mr. Baron Parke should have addressed a chief justice as *Brother* Tindal. What can account for this most unusual deviation from etiquette? It is as if the colonel of a regiment addressed Field Marshal the Duke of Wellington as comrade, or the captain of a ship accosted the admiral of the fleet as mate. Does Baron Parke remember his strange familiarity to the chief justice? and if he does not remember that, does he remember the rest that is put into his mouth by the same accurate, faithful, and impartial reporter?

We should, we repeat, have been glad of an explanation of these little points from Mr. Phillips himself, but we cannot gainsay the prudence of his silence, though our curiosity is balked by it,

Turpiter obticuit, sublato jure nocendi.

Perhaps nine years hence he may resume his vindication ; but alas, the paper of the *Times* is of tough and durable fabric, and will survive that date, and that is the file which the viper bites against worse than in vain.

Unfortunately, we have been unable to procure the published statements of the five distinguished barristers referred to by the

Examiner. But we find in two of the leading journals of jurisprudence printed in London certain comments upon the subject which will be interesting to the profession. It will be observed that they arrive at different results.

The following article appears in the *Jurist* of December 15, 1849.

From Mr. Phillips's letter to Mr. Warren we inferred that the *Examiner* of 1840, and its contemporaries, had supposed Courvoisier's confession to have preceded his counsel's cross-examination of the witnesses. We took it for granted that Mr. Phillips would not be insane enough to rest his defence on an assertion which the mere inspection of the record, admitted by himself to be trustworthy, must disprove. Regarding his letter as an explanation of an equivocal transaction, we at once gave to it a credit which we should not have accorded, without examination, to a direct impeachment of the veracity of a paper second to none in respectability. We confess that we were also a little influenced by the array of dignified witnesses cited by Messrs. Warren and Phillips. We have since procured the report in the *Times* of June 22, 1840, and we are bound to say, that every particular of the *Examiner's* charge is strictly proved. The retainer of his brief after receiving his client's confession was not included in that charge. Mr. Phillips was accused of having appealed to Heaven as to his belief in his client's innocence after receiving the confession of his guilt. We find that he did so twice. He said, "The omniscient God alone knew who did this crime." "And even supposing him guilty of the murder, which, indeed, was known to God alone, and of which, for the sake of his eternal soul, he (Mr. Phillips) hoped he was innocent," &c. To assert that the omniscient Deity alone knows who did the deed, is to call the omnipresent Deity to witness that the speaker does not know. To say that you hope a fact is so, is to affirm your ignorance of its not being so, and something more.

The other accusation, says Mr. Phillips, is that of endeavoring to cast suspicion upon the female servants. The accusation was more extensive. Mr. Phillips defamed other witnesses than the female servants, and without any preliminary disclaimer. The disclaimer itself, when considered in connection with the rest of the speech, amounted to an imputation. "And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all *necessary to his case* to do so. *It was neither his interest, his duty, nor his policy to do so.* God forbid that any breath of his should send tainted into the world persons depending for their subsistence upon their character." He would abstain from accusing the women. Why? Because he believed them innocent? No. Impute the crime to his client, and God alone knew who committed it: but with respect to the women, though he would not say that he believed them innocent, it was not his policy to accuse them. As they had their bread to earn, he would not say any

thing against them. But such disclaimers, even when unequivocally expressed, are mere artifices to induce a confidence in the speaker's candor which he intends to abuse. A practised advocate is not so liable to say what he does not mean as to require to make any such precautionary disclaimer. In fact, Mr. Phillips did so far forget "his interest, his duty, and his policy," as unequivocally and deliberately to make the very imputation he had disclaimed, and to misrepresent the evidence for the purpose of making it more effectually. He said, "The prisoner had seen his master retire to his peaceful bed, and was alarmed in the morning by the housemaid, who was up before him, with a cry of robbery, and some dark mysterious suggestion of murder. 'Let us go,' said she, 'and see where my lord is.' He did confess that that expression struck him as extraordinary. If she had said, 'Let us go and tell my lord that the house is plundered,' that would have been natural; but why should she suspect that any thing had happened to his lordship? She saw her fellow-servant safe — no taint of blood about the house; and where did she expect to find her master? Why, in his bed-room to be sure. What was there to lead to suspicion that he was hurt? Courvoisier was safe, the cook was safe, and why should she suspect that her master was not safe too? . . . He (Courvoisier) opened a shutter, and then the female servant saw a speck of blood on the pillow, and ran screaming out of the room." All this was purposeless babble, if it did not mean that the female servant had a guilty knowledge of the murder before she accompanied Courvoisier to their master's room; and to support this imputation, Mr. Phillips misrepresented the evidence. The witness did not say, "Let us see where my lord is;" she did not see a "speck" of blood. Her evidence is thus given in the *Times*: — "I went as far as the passage, and said, 'For God's sake, let us go and inform his lordship.' . . . . . I went about half way to the foot of the bed, and saw blood upon the pillow. Before I noticed the blood, I said, 'My lord! My lord!'" To obtain his client's safety, the police were accused of a conspiracy against his life. "He would have sent the trunk to a place of safety, where no miscreant, speculating on his share of the 450*l.* reward, could have tampered with it, in order to insure the conviction of the unfortunate man at the bar; but it was left in the room, *accessible to the female servants*, and to the whole gang of policemen. . . . . He had a right to know who placed those gloves in the prisoner's trunk between the 6th and 14th May. Had there not been practice here? This man it was evidently determined should be made the victim of some foul contrivance. Collier, who, for reasons best known to himself, would not go to the trunk without a witness, and, to make sure of his witness, took a brother policeman," &c. "Some villains must have been at work here to provide proofs of guilt against the prisoner."

We have gone into these details, derived from our own perusal of the *Times*' report, in order to shew that we are not now relying, as we did before, on an *ex parte* statement. It is impossible to doubt that the *Times*' report, taken in writing on the spot by gentlemen accustomed to the task, and corroborated in every material particular by the independent

reports of the other morning papers, is more trustworthy than the mere recollection of any listener; and therefore we attribute no countervailing weight whatever to the testimony of the gentlemen whose letters are appended to Mr. Phillips's pamphlet.

So much in justice to the *Examiner*. We regret that we have been led into the personal part of this discussion; but, having expressed an opinion which was unjust, we are bound to acknowledge our error. A question of general interest remains. Mr. Phillips has published letters from five barristers, who say that they heard the whole of the defence of Courvoisier, and heard nothing objectionable. There is, besides, some mention of the favorable testimony of several respected judges. To this last we do not presume to refer, because we have not the expressions in which it was conveyed. If five "competent witnesses" can be found to declare that they heard the whole of Mr. Phillips's speech, and heard nothing objectionable, we may well pause before we unreservedly rely on the recollection of two witnesses as to the effect of the necessarily guarded expressions which may have fallen from those eminent persons. We give to Mr. Phillips's five vouchers the full benefit of the supposition, that their perceptive faculties, as well as their moral sense, may have been somewhat confused; but though their ears did not tell them that the advocate called Heaven to witness to a lie, or that he distinctly imputed his client's crime to persons whom he knew to be innocent, they must, if they had any use of their faculties, have perceived that he expended the principal part of his labor, not in pointing out the defects in the evidence produced against his client — not in protecting him from being condemned on insufficient evidence, or against the forms of law — but in conscious misrepresentations of the evidence and of the characters and motives of the witnesses, and in vehement adjurations and appeals, which, so far from not involving the expression of personal opinion, had no other purpose or significancy than to intimate that the speaker's belief in his client's innocence was so earnest as to have aroused his sympathies on his behalf. A man may argue for any conclusion without asserting his belief; but when he adds to his argument gesticulations and expressions of emotion, he tells us of a conviction so pervading as to have extended from the region of the intellect to that of the affections. We know no difference between a lie acted and a lie spoken. If those gentlemen think that an advocate's duty exacts such conduct of him, and if, as we fear, their sentiments are shared by a minority of their brethren not absolutely insignificant in numbers, it is time to let them know that the Bar acknowledges no such duty, and that it professes, at least, to be governed by the same rules of morality as other classes of society. That its performance sometimes falls short of its principles, is no more than is to be said of human nature in every walk of life. The limits beyond which counsel may not go, on behalf of a client, have been often stated in this paper. To borrow the expression of a correspondent, "he may utter fallacies, because his business is to present all plausible arguments, and to judge none, but he must present them ingeniously. In civil cases, though he is to misrepresent nothing — to gain nothing by a trick — he is to take care that his client is not de-

feated, except upon strict legal proofs and legal grounds, whether his cause be morally just or not. Therefore he is not to bring forward or disclose any adverse fact, whether accessible to his adversary or not. . . . But the community has an interest, paramount to any individual interest, in uniformity of decision. Therefore, though an advocate in a civil cause may suppress facts, he must not suppress law; nay, he must — as has been emphatically declared more than once from the Bench — interfere to save the Court from inadvertently disturbing the law in favor of his client if he is aware of any principle or authority, overlooked by the Court, which would guide it to a right decision. If this were not so, the assumption by a looker-on of the character of *amicus curiæ* would be an impertinent intrusion. In criminal cases a further public interest is at stake — that crime should not escape unpunished. Here the sole function of the advocate is the guardianship of innocence and of the law. He must take care, above all things, whether he be prosecutor or defender, that the innocent do not suffer. Subject to that care, he must see that the rules of law, as well those devised for the punishment of guilt as those interposed by way of countercheck for the protection of innocence, suffer no impair. To aid in the escape of the guilty is no part of his office; actively to aid in the conviction of the guilty is no part of his office if he be defender, because the imposition of such a duty would frustrate the ends for which advocacy is instituted. . . . . The advocate of a prisoner must by no means leave unnoticed, much less endeavor to put out of sight, any matter of law tending to criminate his client." Our correspondent proceeds to infer that an advocate must not defend a client who has confessed his guilt. This is certainly not the rule of the English Bar. To deprive a prisoner of the assistance of counsel, on the mere report of a confession to his gaoler, or to any one in the interest of the Crown or of the prosecutor, would be to expose prisoners to the danger of intimidation and coercion. The propriety of defending a prisoner who has confessed his guilt to his own counsel, and for the purposes of his defence, depends on more technical considerations. A criminal is to be convicted only upon legal evidence; and his moral guilt may be consistent with a legal defence, to the benefit of which the law gives him a title. This, we fear, is a necessary though undoubtedly a large concession to guilt. In a case where some of the witnesses have been implicated with the prisoner in misconduct, though not in the actual crime of which he stands accused, it is obvious, that counsel intrusted with such a confession cannot conduct the defence without danger of frustrating the ends of justice. Lord Langdale's exposition in the case of *Hutchinson* v. *Stephens*, (1 Kee. 68) of the duties of counsel, has been partially cited by the *Examiner*. It is as follows: — "With respect to the task which I may be considered to have imposed upon counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honorable and important services which they constantly perform, as ministers of justice acting in aid of the judge before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client to gain the victory, if he can, on a particular occasion. The zeal and theargumenis of every counsel, knowing what is due

to himself and his honorable profession, are qualified, not only by considerations affecting his own character as a man of honor, but also by considerations affecting the general interests of justice." That the confidence mentioned by Lord Langdale is sometimes abused, is, as we have said a consequence of human frailty. The remedy is to be sought, we believe, principally, in the abolition of trial by jury in non-political cases, and in the exercise by the Bench of a more strict censorship over the Bar. In the old trial by battle, (of which the trial by counsel is the modern representative,) if either of the champions was detected in foul play, he was liable to severe punishment, and incapacitated from being again employed. A few modern examples of similar discipline would effectually disabuse Mr. Phillips and his friends of their peculiar notions as to the license of counsel.

On the other hand, the *Legal Observer* of Dec. 22, 1849, expresses its confidence in Mr. Phillips's integrity unshaken by any thing which has transpired. We give the article in full: —

MR. CHARLES PHILLIPS, AND HIS DEFENCE OF COURVOISER.

A few weeks ago, we expressed in decided terms, an opinion that the learned gentleman above mentioned had given a conclusive and triumphant answer to the charges which had so long been circulated against him, relative to his defence of the confessed and convicted murderer of Lord William Russel. Those charges were twofold: that he had impiously appealed to the Deity to attest the truth with which he declared his belief that Courvoisier *was innocent;* and, moreover, that notwithstanding the confession, he had cruelly sought to impute the guilt of the murder to one or both of the women servants of the murdered nobleman, who had appeared as witnesses against Courvoisier. A graver accusation than this could not have been preferred; and — without pausing to reprehend the spirit in which that accusation has been from time to time, and so very recently revived — we own that we rejoiced, for the credit of the profession, to see a clear and strong demonstration of the falsity of that accusation, in the eloquent letter of Mr. Phillips to Mr. Warren. It appeared to us to answer every point of the charge: and we have rarely seen so prompt and decisive an effect produced on the public mind, under similar circumcumstances. The triumph of Mr. Phillips was complete, and the cloud which had settled for years on his fair fame, suddenly rolled away. Thus, on the 24th ultimo, we expressed ourselves; and we did not do so hastily, feeling that if we had, we should, as an humble organ of professional opinion, have betrayed the trust and confidence reposed in us. We carefully examined, and reflected for ourselves; and having done so, cannot sufficiently express our astonishment and regret, at seeing the demolished charges revived, and that with evident personal ill-feeling.

The charge of having appealed to God to attest the sincerity of his belief that Courvoisier was innocent has, however, crumbled away; and all that is now alleged, is, that Mr. Phillips, having shortly before been informed by Courvoisier that he was guilty, publicly told the jury that "the

omniscient God *alone knew who had done the crime.*" A more gross and glaring *variance* or *departure* (to use a technical language) from the original charge — a more complete changing of the ground of attack, we have seldom seen. We regard the original charge as annihilated. Supposing, then, Mr. Phillips to have used the expression above quoted, he ought, in all fairness, to be taken to have meant only, that as far as concerned the jury's legitimate means of judging *from the evidence*, they could not absolutely *know* who had done the crime. That this was the only legitimate interpretation to be put on his words, is evident from the fact that, when uttering them, he was aware that he himself, Mr. Clarkson, Mr. Flower, the prisoner's attorney, and the prisoner, knew the fact of the prisoner's avowal of guilt. What, then, could Mr. Phillips have *meant* by such an assertion? He knew that the confession would in a few hours be blazoned over the world; and cannot be supposed to have been insane enough to venture on so impious an asseveration, taken in its *literal* sense, and one so sure of quick detection.

But did he, in fact, utter the expression in question? If, as we have been informed on what we deem good authority, several persons present are ready to depose on oath that he said simply, "Do you ask *me* who did this crime? *Ask the omniscient God!*" There is an end of even this varied version of the calumny; for nothing is easier than to suppose the reporter, though entitled to every degree of credit for correctness, to have fallen into a slight confusion of terms, in reporting the speech *in the third person*. But, however this may be, it is impossible to believe that what was actually said by Mr. Phillips was of the dreadful character imputed to him, regard being had to the decisive and unquestioned testimony of the late Chief Justice Tindal and Mr. Baron Parke, to the unexceptionable character of Mr. Phillips's address. After that testimony, we presume every thing in favor of Mr. Phillips, and against the validity of the charges.

The same observation applies to the second item of accusation, and which is that relating to the alleged inculpation of the female servants. This, also, we regard as conclusively disposed of. It was evidently founded originally on a forgetfulness of the all-important fact, that the cross-examination of the women-servants *had preceded*, instead of *succeeding*, the confession of Courvoisier. After he had confessed, Mr. Phillips, at the very outset of his defence, conspicuously and anxiously disclaimed all intention of imputing the crime to the female servants; and the jury doubtless carried the disclaimer along with them, as Mr. Phillips evidently intended they should, throughout the defence. It seems to us highly uncandid in any commentator on the case to suppress this important fact, or seek to fritter away the effect of it *by harping on one or two stray expressions apparently at variance with it*, culled out of a three hours' speech by a most eloquent counsel, speaking under circumstances of almost overwhelming and perhaps unparalleled difficulty. Was Mr. Phillips to defend Courvoisier, or was he not? It is admitted that he was bound to do so, and by "all fair arguments *arising on the evidence.*" That he discharged this trying duty admirably, is vouched for by Chief Justice Tindal, and Mr. Baron Parke. It is impossible to have more conclusive and un-

exceptionable testimony. It is impossible to impugn either the intellectual capacity, the opportunities for vigilant observation, or the lofty integrity and honor of these distinguished personages; and their testimony crushes the calumny into powder.

There is one circumstance, however, having a material bearing on this case, on which we have taken some pains, for the satisfaction of ourselves and our readers, to inform ourselves correctly. We have read the *Times'* report of the trial; and from the remarkable and suspicious facts elicited on the cross-examination of the police, especially with reference to the blood-spotted articles of dress alleged to have been found in the prisoner's portmanteau, we entertain no doubt that Mr. Phillips believed there had been foul play, brought into action by the large reward of 450*l.*, to *ensure* a conviction. The police, of course, knew nothing of the murderer's confession, yet they spoke to facts which, if impugned, *would have sealed the doom of the accused.* These cross-examinations have been kept in the back ground during the recent controversy; and we have no hesitation in expressing our opinion, that had Mr. Phillips abstained from commenting on the facts thus elicited in evidence, he would have fatally compromised his character as an advocate. Infinitely better would it have been, to have thrown up his brief, as he had originally intended. Had he, however, done so, a far louder clamor than has since arisen would have been excited against him; and we should have heard then of his poltroonery and perfidy, equally whether he had thrown up his brief, or, retaining it, virtually aided the conviction of his client, by a faint and damnatory line of pseudo-defence.

The broad features, the strength of Mr. Phillips's case, must remain in the fact that two of the best judges who ever sate in a court of justice, and who watched the eloquent speaker in defence of the accused, with practised sagacity, and one of them with specially quickened vigilance, are proved beyond all possibility of doubt, to have not only pronounced Mr. Phillips not guilty of the offences since imputed to him, but also to have declared his conduct unexceptionable, — the late lamented Lord Chief Justice adding that, "under circumstances of extraordinary difficulty," Mr. Phillips had "properly discharged a most painful duty." These facts there is no gainsaying. One of these eminent personages is alive, and knows and approves of the publicity given to these facts. If Mr. Phillips had rested his refutation on this evidence alone, that refutation would have been complete and irrefragable.

In a matter of this kind, we feel it a duty, as faithful chroniclers of professional events, to come forward and unhesitatingly register our adherence to a deliberately formed opinion, in favor of a gentleman who has, throughout a long professional career, maintained a character of undoubted integrity, and worthily occupies a seat on the bench of justice.

Recent English Decisions.

Court of Queen's Bench. Hilary Term, 1849.

Boosey *v.* Davidson.[1]

There is copyright in this country for the works of a foreigner published here without having been before published abroad.

In an action for infringing the copyright in an opera, defendant, in order to prove a prior publication, offered in evidence the statement by a witness, that he had seen in print in Milan, many parts of the opera before the 10th June, 1831 : — Held inadmissible, without accounting for the non-production of the printed copies.

The statement by a witness, of his having heard, before the 10th June, 1831, persons in society sing parts of the opera at a piano, with printed music before them, is no evidence that the music in the printed papers was the same as that of the opera in question.

Case.— The declaration stated, that the plaintiff was the proprietor of the copyright in a certain book, to wit, a musical composition called " Prendi l'anel ti dono ; Scena e Duetto nell' Opera La Sonnambula, del M°. Bellini," and four other musical compositions, " which said several books had been and were, and each of them had been and was, first printed and published in that part of the united kingdom of Great Britain and Ireland called England, and which said several books had been and were, and each of them had been and was, first published within twenty-eight years last past, and which said several copyrights, and each and every of them, were subsisting at the several times of the committing by the defendant of the grievances hereinafter mentioned ; yet the defendant well knowing the premises, but contriving &c., heretofore, and after the passing of the stat. 5 & 6 Vict. c. 45, and within twelve calendar months next before the commencement of this suit, to wit, on &c., wrongfully and injuriously, and without the consent in writing of the plaintiff, so being the proprietor of the said copyrights, and each and every of them, did, in a certain part of the British dominions, to wit, in that part of Great Britain called England,

[1] We print in the present number two very contradictory English cases on the subject of international copyright. In the confusion necessarily attending such a state of things, all who respect the claims of authors will wait with some anxiety for a decision by the tribunal of the last resort.

print, and cause to be printed, for sale, divers, to wit, 20,000 copies of each of the said books, contrary to the form of the statute in such case made and provided." The declaration further charged the defendant with selling and publishing, and exposing to sale and hire, and having in his possession for sale and hire, and also with printing for sale and hire, copies of the said books. "By means of the committing of which said grievances by the defendant, the plaintiff hath been and is greatly injured" &c. Pleas, among others, first, not guilty; secondly, that the plaintiff was not the proprietor of the copyrights of and in the said books; thirdly, that the copyrights in the said books were not subsisting in manner and form &c.; fourthly, that the said books in the said first count mentioned were not first printed or published in England. On the trial, before Erle, J., at the sittings at Westminster after Trinity Term, 1847, the plaintiff proved his proprietorship in the copyright of the musical pieces by giving in evidence a certified copy of an entry in the book of registry, in pursuance of sect. 11 of stat. 5 & 6 Vict. c. 45, which stated the date of the first publication to be the 10th June, 1831. It appeared that the music of the opera La Sonambula was composed by Bellini, an Italian, and that the copyright in the opera, for publication in Great Britain and Ireland had been assigned to the plaintiff. For the defendant, evidence was given for the purpose of shewing that it had been published abroad before the 10th June, 1831; a witness, who was the prompter at the Carcano Theatre at Milan, stated that he had heard the opera La Sonambula played there in March, 1831, by persons who had the music before them, and that it was played correctly; that the copies used by the performers were not printed, but written; and in answer to a question whether, before June, 1831, he had seen printed copies of the musical pieces in question offered for sale at the shop of Signor Ricordi, a printer and publisher of music at Milan, he stated that he had seen copies of some part, and perhaps all, of the music of the opera offered for sale at that shop before that time. Ricordi was in court, but was not called. It was objected for the plaintiff, that this evidence was inadmissible, because it was parol evidence of the contents of written documents. The learned judge was of opinion that the evidence was inadmissible. The same witness stated, that, before the 10th June, 1831, he had heard the airs

in question sung in private society from printed music. The music in question had the appearance of being printed from an original plate engraved abroad, or by a foreigner. It was then objected for the defendant, that the plaintiff, as assignee of the copyright of a musical piece composed by a foreign composer, and published abroad, had no right of action. The learned judge reserved leave to the defendant to enter a verdict on the issues raised by the second and third pleas, and directed the jury that the defendant had offered no evidence, which ought to be submitted to them, to raise a reasonable presumption that the musical pieces in question were published before the 10th June, 1831; and a verdict was accordingly given for the plaintiff, damages 1*s*. In the following Michælmas term, (Nov. 5,)

Shee, Serjt, obtained a rule *nisi* accordingly, citing *Chappel* v. *Purday*, (14 Mee. & W. 303; 9 Jur. 495,) or for a new trial, on the ground of the rejection of evidence.

In Trinity Term, 1848,*

Byles, Serjt., *Bovil*, and *Henniker* shewed cause. First, the foreign composer of a work first published in England may have, and by the law of England has, a copyright in it. The principles on which copyright is founded are laid down in *Millar* v. *Taylor* (4 Burr. 2303) and *Donaldson* v. *Beckett* (Id. 2408; 2 Bro. P. C. 129.) An alien friend may enjoy every description of property in this country, except real estate, and there is nothing in stat. 5 & 6 Vict. c. 45, to deprive him of that right. *Bentley* v. *Foster*, (10 Sim. 329;) and *D'Almaine* v. *Boosey*, 1 (You. & C. 288.) In *Chappel* v. *Purday* (14 Mee. & W. 303; 9 Jur. 495) it was held, that a foreign author residing abroad, and publishing a work there, had not any copyright here, either at common law or under the stats. 8 Anne, c. 19, and 4 Geo. 3, c. 136; that case does not apply where the first publication is in England. In *Cocks* v. *Purday* (12 Jur. 677) it was expressly decided that an alien friend, the author of a work composed abroad, which was published simultaneously in England and on the continent, has a copyright in that work. The plaintiff, the assignee of the copyright, by registering the title of the publication, and other particulars, at Stationers' Hall, in pursuance of sect. 11 of stat. 5 & 6 Vict. c. 45, acquired a

* May 27, before Patteson, Coleridge, and Erle, JJ.

primâ facie title to the copyright, and it lay on the defendant to disprove that title, by showing a prior publication abroad. The first publication confers the right. [They cited sect. 57 of stat. 34 Geo. 3, c. 20, and sect. 14 of stat. 1 & 2 Vict. c. 59.] The question whether there can be a limited copyright does not arise; it does not appear that the plaintiff has a limited copyright. Secondly, evidence of the contents of books seen in the shops at Milan prior to the 10th June, 1831, was properly rejected. "Oral evidence cannot be substituted for any instrument in writing, the existence of which is disputed, and is material to the issue between the parties, or to the credit of the witnesses, and which is not merely the memorandum of some other fact." (1 Phill. Evid. p. 441, 8th ed.; citing Lord Tenterden in *Vincent* v. *Cole*, M. & B. 258; and *The Queen's case*, 2 B. & B. 284, 286, 287.) The conformity of the contents of the copies seen at Milan with the document in question is the question in the cause. [They cited *Alivon* v. *Furnival*, (1 C. M. & R. 377, 292); *Reg.* v. *O'Connell*, (Arm. & Trev. 163); *Reg.* v. *Fenton*, referred to in *Robinson* v. *Brown*, (16 Law Journ., N. S., C. P., 48); *Williams* v. *Stoughton*, (2 Stark. 292); *The Wharton Peerage case*, (12 Cl. & Fin. 295, 304).] [*Coleridge*, J., referred to *The Baron de Bode's case*, (8 Q. B. 208, 246; 10 Jur. 217, 773.) *Patteson*, J.—In that case parol evidence of a decree of the French National Assembly was received, on the ground that it was matter of science. *Coleridge*, J.— Suppose the statement of a witness was, "I saw a copy of Paradise Lost at Milan," would not that be admissible?] No, the rule for the exclusion of secondary evidence is inflexible. [*Coleridge*, J.— The rule is not inflexible; it does not apply where there would be great inconvenience in producing the original.] Ricordi, at whose shop the printed copies of the music were seen, might have produced a copy. [*Coleridge*, J. He might have sold every copy. In *Rex* v. *Hunt*, (3 B. & Ald. 566, 574) parol evidence was given of the inscriptions on flags and banners, though there was no impossibility to produce them.] The evidence was admitted in that case on the ground that the inscriptions used on such occasions had rather the character of speeches than writings, which shows that the rule was considered inflexible. The inscription on a flag is not a written instrument. [*Coleridge*, J.— Suppose the statement

of a witness was, that copies of a prospectus had been freely circulated.] The contents of the prospectus would not be in issue. [*Coleridge*, J. — In an action for libel, in order to prove damage, evidence is often given that copies of it have been seen in circulation.] Further, according to the objections delivered in pursuance of the statute, the defendant was bound to prove a publication at Milan prior to the 10th June, 1831, in a particular manner and by a particular person. The attempt to show that the music must have been printed abroad was no evidence of a prior publication abroad. [They cited *The Duke of Queensberry* v. *Shebbear*, (2 Eden, 329).] The representation of an opera at a theatre is not a publication.

June 6.[1] *Shee*, Serjt., and *Crompton* contra. First, since stat. 54 Geo. 3, c. 156, the right of copyright is limited to the author and his assignee. If copyright existed at common law, it was destroyed by statute. (Lord Abinger, C. B., in *Chappel* v. *Purday*, 4 You. & C. 485, 494.) The plaintiff must show, that a foreigner, resident abroad can have a copyright in a book published in England. But the statutes relating to copyright were passed for the encouragement of British authors, and a foreigner has no copyright. (*Millar* v. *Taylor*, 4 Burr. 2306, 2310, 2320.) [They also cited Lord Mansfield, in *Robinson* v. *Bland*, (2 Burr. 1077, 1079).] The reasons given by Lord Abinger, C. B., in *Chappel* v. *Purday*, (4 You. & C. 485,) following his own decision in *D'Almaine* v. *Boosey*, (1 You. & C. 289,) are not satisfactory. A great part of the judgment in *Cocks* v. *Purday* (12 Jur. 677) is not applicable, and the decision was upon a section in a recent act, passed since the publication of the opera in question. The right which the publication of a work in England gives is analogous to that which the bringing of an invention into this country gives; and there is no exclusive right in a subject not protected by patent. (*Cannon* v. *Jones*, 2 V. & B. 218.) Secondly, the general rule, stated in 1 Phill. Evid. p. 441, 8th ed., is subject to other exceptions besides that of the impossibility of producing the original. Parol admissions are evidence against the party making them, although they relate to the contents of a written instrument. (*Slatterie* v. *Pooley*, 6 Mee. & W. 664; 4 Jur.

[1] Lord Denman, C. J., was present.

1038.) The public inconvenience from the removal of books of public concernment justifies the introduction of secondary evidence. *Mortimer* v. *M'Callan*, (6 Mee. & W. 58; 4 Jur. 172,) where Lord Abinger, C. B., said, (6 Mee. &. W. 69,) "The principle of law is, that, where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the document in which the entry is made, you are to be entitled to the next best evidence of it, by proving whose writing it was." In *Rex.* v. *Hunt* (3 B. & Ald. 566) there was no impossibility of producing the flags. In this case it would have been impossible to trace the particular copies seen by the witness in the shop at Milan prior to 1831. It is a rule, that, to prevent fraud, the best attainable evidence which the nature of the thing is capable of shall be produced to prove every disputed fact. (Bull. N. P. 293; 3 Stark. Evid. 995.) [They also cited *Brewster* v. *Sewell*, (3 B. & Ald. 296).] Publication in a newspaper may be proved without producing a copy actually published. *Rex.* v. *Pearce*, Peake, 75.) Further, independently of the evidence rejected, there was sufficient proof of a prior publication, at Milan, in 1831, by Ricordi. It was sufficient to give reasonable evidence of the identity; proof of part of the contents was sufficient to establish the identity. [*Erle*, J. — A little more inquiry would have let in the evidence.] *Cur. adv. vult.*

Patteson, J. now delivered the judgment of the Court. — In this action, for infringing the plaintiff's copyright in five musical pieces, being parts of the opera La Sonnambula, by Bellini, a question was argued, whether there is copyright in this country for the works of a foreigner published here, without having been before published abroad; and we decide that question in favor of the plaintiff, in accordance with the judgment pronounced in the Common Pleas, in *Cocks* v. *Purday*, (12 Jur. 677.)

It was further objected, that there should be a new trial, for the rejection of the statement by a witness, that he had seen in print, in Milan, many parts of the Sonnambula before the 10th June, 1836; but, inasmuch as the proposed evidence is a statement of the contents of a written instrument, without accounting for its non-production, this objection fails.

It was lastly contended, that the statement by the witness, of his having heard before the 10th June, 1831, persons in society sing parts of the opera in question at a piano, with printed music before them, as if performing therefrom, was some evidence of a publication of that opera; and that therefore the judge was wrong in withdrawing from the jury the question of a prior publication abroad. But it appears to us that this objection also fails, and that the same answer applies.

By the 5 & 6 Vict. c. 45, s. 11, registration is *primâ facie* evidence of copyright; and, by sect. 16, the defendant who means to set up a prior publication must give a notice, stating when and by whom such publication was made; and the plaintiff having relied upon the registration, and the production of the five pieces registered, the defendant had to prove a prior publication, and he accordingly endeavored to show that the printed opera had been publicly sold. The obvious course for doing this would be to call the tradesman who had sold, or a customer who had bought, the work in question in a course of public sale; in either case the identity of the work so sold with the work in question should, by law, be made apparent, either by the production of the work, so that the contents might be compared, or by accounting for its non-production, so that secondary evidence of such contents might be made admissible. The evidence in question was adduced to show, that the printed paper lying before the musical performer had been purchased in the usual way, and which, for the present argument, may be assumed, and also that its contents were the same as those of the work registered by the plaintiff. But the printed paper itself is the legal evidence of its contents, and the plaintiff had a right to object that there was no legal evidence of its contents unless it was produced or accounted for. The defendant showed no inability to produce the paper — indeed, the contrary was rather apparent, as the bookseller and shopman who were supposed to have sold the work at Milan were shown, by cross-examination, to be present at the trial; and he offered the several presumptions, that the witness carried in his memory the words and music of the plaintiff's work, and the words and music that he had so heard in society, and could attest their identity, and also that the printed paper lying before the performer contained that which was being performed, instead of the certainty which

the production of the paper itself would have given, and which certainly is required by law when it can be had.

It follows, that the rule must be discharged. — *Rule discharged.*

Court of Exchequer. Trinity Term.

BOOSEY *v.* PURDAY.

(*Copyright.*) — A foreign author residing abroad, or his assigns, is not an author within the meaning and cannot have the benefit of the statutes 8 Ann. c. 19, and 54 Geo. 3, c. 156, as those acts were intended for the encouragement of British talent and industry by giving to *authors* who are British subjects either by birth or residence, or their assigns, a monopoly in their literary works dating from the period of their first publication here.

(*Foreigner.*) — But, supposing a foreign author and his assigns to be within these acts, and to have by law a copyright, where the author means to publish contemporaneously in England and abroad, he or his assigns are not disentitled to copyright by the actual publication in one place before the other on the same day.

THIS was an action, under the 5 & 6 Vict. c. 45, s. 17, for infringement of the plaintiff's copyright in ten airs from the opera "La Sonnambula." The declaration, after alleging that the airs in question had been first published in England, charged that the defendant, first, unlawfully imported for sale into England from parts beyond the seas certain copies of the books in question; second, that he unlawfully published and exposed them for sale, knowing them to have been unlawfully imported; third, that he unlawfully had them in his possession for sale and hire, knowing them to have been unlawfully imported; fourth, that he unlawfully sold and exposed for sale the books in question, &c. The defendant pleaded the general issue; that the plaintiff was not the proprietor of the books in question; and that he had not the copyright in them; together with several special pleas putting in issue the different allegations in the declaration. At the trial before Pollock, C. B., it appeared that the opera "La Sonnambula" was composed by Bellini, a foreigner, and produced on the stage at Milan in the spring of 1831; subsequent to which his right to the airs in question was assigned to G. Ricordi, also a foreigner, by parol, as they lawfully might by the law of Austria. In June, 1831, Ricordi, in

England, assigned them to the plaintiff, who, on the 10th of that month, between the hours of twelve and one, published them in London, depositing copies at Stationers' Hall and some other places required by law. On the same day nine of the airs in question were printed and published at Milan, at 9 A. M. Milan time, and the remaining one, entitled "A fosco cielò a notte bruna," in the month of August in the same year. The difference in longitude between London and Milan would, it was said, make a difference in time of about an hour and a half. After the passing of the 5 & 6 Vict. c. 45, for amending the law of copyright, the plaintiff, on the 13th May, 1844, registered the ten pieces in the manner pointed out by the 13th section of that act; subsequent to which the infringement complained of in the declaration was committed by the defendant. On this state of facts it was agreed that a verdict should be entered for the plaintiff and defendant on the several issues accordingly, leave being reserved to the plaintiff and defendant respectively to move the court, with liberty to either party to treat the judgment of the court in banc as the direction of the judge at *nisi prius*, and to frame a bill of exceptions thereon. Rules for this purpose were granted in Michaelmas Term, and came on to be argued in Easter Term, on the 24th and 26th April, before Pollock, C. B.; Parke, Rolfe, and Platt, BB.

The Attorney-general and *Crompton*, for the defendant.—The principal question is whether a foreigner resident abroad, or his assigns, can obtain a copyright here. *Delondre* v. *Shaw* (2 Sim. 237) and *Guichard* v. *Mori* (9 Law Journ., O. S., Chanc. 227) are authorities against it. In the case of *Chappel* v. *Purday*, (14 Mee. & W. 303; 9 Jur. 495,) also this court intimated a strong impression to that effect, but the point was not decided. A different opinion was indeed expressed by the court of common pleas in *Cocks* v. *Purday*, (5 C. B. 860; 17 Law Journ. C. P. 273; 12 Jur. 677,) and also by the queen's bench in a case not yet reported[1]) of *Boosey* v. *Davidson*; but those cases proceeded on the erroneous assumption that the question depended on the 5 & 6 Vict. c. 45. A person who brings over a foreign invention may be considered as the inventor in this country, and as such entitled to a patent,

[1] See page 574 of this No.

Edgeberry v. *Stephens*, (2 Salk. 447,) but the case of a foreign author of a literary work is quite different, copyright being unknown to the common law and depending altogether on the construction of the statutes 8 Anne.. 19, and 54 Geo. 3, c. 146. By the 8 Ann. c. 19, which was passed, as the preamble says, for the encouragement of learned men to compose and write useful books, "the author of any book or books already composed and not printed or published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same; and if any other bookseller, printer, or other person whatsoever, within the times limited and granted by this act as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted without the consent of the proprietor, shall sell, publish, or expose to sale, or cause to be sold, published or exposed to sale, any such book or books, without such consent first had and obtained as aforesaid," shall forfeit such books or sheets, and be subject to a penalty, &c. By the 54 Geo. 3, c. 146, s. 4, "the author of a book and his assignee or assigns shall have the sole liberty of printing and reprinting such book for the full term of twenty-eight years, to commence from the first publishing the same, and also if the author shall be living at the end of that period, for the residue of his natural life; and if any bookseller or printer or other person whatsoever, shall, within the terms and times granted and limited by this act as aforesaid, print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the author or authors or other proprietor or proprietors of the copyright of and in such book and books first had and obtained in writing; or knowing the same to be so printed, reprinted, or imported, without such consent of such author or authors, or other proprietor, or proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, or shall have in his or their possession for sale, any such book or books, without such consent first had and obtained as aforesaid, such offender shall be liable

to a special action on the case," &c. The object of these statues was to encourage *native* talent by giving to every man as against the world an exclusive right of sale of the productions of his own brain, and a similar right against himself to any person to whom he may assign that right. A foreigner therefore who composes a work abroad and assigns his right in it to a party here cannot be said to be an "*author*" within the meaning of these enactments, while the registry of the work at Stationers' Hall confers no right and only relates to the proof of existing titles. A contrary doctrine would lead to this absurdity, that one man would be the author of a work in England, while another would be the author in Germany, another in Italy, &c., and slso that a man would be deemed an author for different periods of time according to the duration of copyright by the law of each country. Secondly, the opera of "La Sonnambula," of which the airs in question form part having been published by singing at the theatre at Milan, had become publici juris before the assignment to the plaintiff. *Clementi* v. *Walker*, (2 B. & C. 861.) Thirdly, in order to effectuate a valid assignment of a copyright in England, the assignment must be by deed attested in the manner prescribed by the statute of Anne. *De Pinna* v. *Polhill*, (8 C. & P. 78.)

Bovil and *Webster*, contra. — The first question in this case is one of the greatest importance both to this kingdom and the literary world. All nations have an interest in the protection of every species of property, and it is a narrow view of this law to construe it as passed solely to protect native genius. Every author has an inherent property in his literary works, of which no law can deprive him, for they are the creation of his brain, which he can communicate to the world or withhold at pleasure; and the right of transferring it to others is an inseparable incident to it. The common law of this country acknowledged this kind of property, *Millar* v. *Taylor*, (4 Burr. 2303); *The Stationers' Company* v. *Seymour*, (1 Mod. 256); *Beckford* v. *Hood*, (7 T. R. 620); *White* v. *Geroch*, (2 B. & A. 298); *The Duke of Queensberry* v. *Shebbeare*, (2 Eden, 329); *Prince Albert* v. *Strange*, (13 Jur. 45, 109); and it is recognized in the Licensing Act, 13 & 14 Car. 2, c. 33, and other acts of that century referred to in Lowndes on Copyright, 17; so that the only effect of the statute of Anne was to restrain and

limit this preëxisting right. [*Pollock*, C. B. — According to that argument, if a man invents a tune and sings it, no one else may sing it without his leave ; if a man by reason comes to a certain conclusion, the rest of the world may not do so after he has communicated to them the process of reasoning by which he arrived at it. Had either Newton or Leibnitz a property in the system of fluxions or the differential calculus ; or had Newton a property in his great discovery ? — and the same may be asked respecting any man who discovers a physical fact or a peculiar system of husbandry. Whether he is under a social obligation to communicate his discovery to mankind is another matter, with which we have nothing to do.] There is a difference between the invention of a thing and the copyright in it. A man may keep his inventions to himself, but the exclusive copyright in them arises from the act of publication, and is in this respect analogous to patents, except patents of engravings, which are governed by peculiar statutes of their own. [*Pollock*, C. B. — Can the man who lends another a copy of his work prevent him from committing its contents to memory and repeating them ? Could not the person who heard the poems of Homer sung have committed them to memory and sung them to others ?] Yes. [*Parke*, B. — Then according to your argument we possess those beautiful poems by means of a continual infraction of law.] A man may play music which he has heard without infringing the composer's copyright ; but it is otherwise if he publishes a copy of it. *Bach* v. *Longman*, (Cowp. 624.) [*Pollock*, C. B. — How long does the exclusive right which you speak of last ? Is the author's son entitled to it after him ?] Forever. [*Pollock*, C. B.— Then the authors of the book of Job or the songs of Bacchus had a copyright in them, which subsists to this day ?] No ; for by the general consent of nations a work which has been published becomes after a reasonable time *publici juris*, and the property of all the world. [*Parke*, B. — Look at the general object for which the statute of Anne was passed, " to encourage learned men to compose and write useful books."] That means the encouragement of learning generally. [*Parke*, B. — Legislatures do not legislate for the general benefit of mankind, but of their own subjects who are governed by their laws. The expression in that statute " any person or persons " must therefore *primâ facie* be understood to mean British sub-

jects either by birth or residence. [*Platt*, B. — It is remarkable that one of the statutes on the subject of copyright, the 41 Geo. 3, c. 107, recites "that it is expedient that further protection shall be afforded to the authors of books and the purchasers of the copies and copyright of the same *in the United Kingdom*."] Why should not a foreigner be protected in the enjoyment of this right as well as of other personal rights? (Com. Dig. "Alien," C. 5); *Pisani* v. *Lawson*, (6 Bing. N. C. 90); and the point not having been mooted until late years is strong presumptive evidence that the law was so understood; which view is confirmed by the International Copyright Acts, 1 & 2 Vict. c. 59, and 7 & 8 Vict. c. 12. Besides this action is founded not on the statute of Anne, but the 5 & 6 Vict. c. 45, which in order to meet the difficulty which arose in *Power* v. *Walker*, (4 Camp. 8,) vests the copyright in the "proprietor" of the work, an expression which must *primâ facie* be taken to mean the person by whom it is entered at Stationers' Hall. At all events the plaintiff being a British subject is entitled to the benefit of the statute; and supposing him to have only registered the work ought to have the copyright for his trouble. *Cocks* v. *Purday* and *Boosey* v. *Davidson* are authorities in point, and are supported by *Bentley* v. *Foster* (10 Sim. 329.) *Delondre* v. *Shaw* is a mere dictum, which at most only applies to the case of a person who has not first published here. The simultaneous publication at Milan on the same day cannot affect the question; for it would be absurd to take the difference of longitude into calculation; *de minimis non curat lex;* a day is never divided in law (Gilb. Exec. 15; *Boucher* v. *Wiseman*, Cro. El. 440,) unless necessity requires it, and it would serve no good purpose to do so here; besides a day which affects a right should be counted *exclusive*. *Russell* v. *Ledsam*, (14 Mee. & W. 574; 9 Jur. 557.) [*Pollock*, C. B. — For acts to be absolutely contemporaneous is practically impossible. If difference of longitude is to be taken into account, must the distance between the places be measured, or can we take it from the books of geography? *Parke*, B. — The question then remains, did the publication of these airs at the theatre at Milan render them *publici juris* before the assignment to the plaintiff?] No; for publication at a theatre is different from publication of a copy; it is a combination of music, language, acting, &c.:

D'Almaine v. *Boosey*, (1 Y. & C. 298); *Coleman* v. *Warren*, (5 T. R. 245); *Macklin* v. *Richardson*, (Amb. 694).] Thirdly, as to the mode of assignment, it is a general rule of jurisprudence that the validity of a contract is to be decided by the law of the place where it is made. (Story's Confl. Laws, § 242.)

Cur. adv. vult.

The judgment of the court was now delivered by

Pollock, C. B. — Upon the argument of this case, every authority bearing on the question raised was cited and commented upon.

This court, in the case of *Chappel* v. *Purday*, (14 Mee. & W. 303; 9 Jur. 495,) had previously intimated its opinion that the right of the plaintiff must depend on the statute law of this country, the laws of foreign nations having no extra territorial power, and the plaintiff no right at common law; and that if the question were not concluded by authority the proper construction of the statutes 8 Ann. c. 19, and 54 Geo. 3, c. 156, on which the question must depend was, that a foreign author residing abroad, or his assigns, was not an author within the meaning, and could not have the benefit of, those acts which were intended for the encouragement of British talent and industry, by giving to British *authors* or their assigns a monopoly in their literary works, dating from the period of their first publication here — and we thought that supposing the authorities to have put another construction on the acts they did not bring the case of that plaintiff within them. It was unnecessary for the court to decide whether those authorities were conclusive upon them or not, for giving full weight to them the then plaintiff had no right. Upon a careful review of those authorities we do not think they were such as to preclude us from putting what we deem the true construction on the statutes. No court of common law had decided the question. In *Clementi* v. *Walker*, (2 B. & C. 861,) it may be collected that the court of king's bench thought that foreigners were not entitled to the benefit of the statutory right, but the case does not amount to a decision to that effect.

The vice-chancellor of England had expressed an opinion against the right of a foreigner in *Velondre* v. *Shaw*, (2 Sim. 237,) in 1828, and in *Page* v. *Townsend*, (5 Sim. 395,) in 1832, on the construction of several acts protecting engravings,

one only of which was expressly confined to plates engraved in Great Britain, and the same learned judge intimated that the foreigner might have a copyright, but directed the question to be tried at law in the case of *Bentley* v. *Foster*, (10 Sim. 329,) in 1839. In the mean time, in 1835, Lord Abinger had decided in the case of *D'Almaine* v. *Boosey*, (1 Y. & C. 298,) that a foreigner might have a copyright and granted an injunction.

In the state of the authorities, somewhat conflicting as they stood at the time of the decision of *Chappel* v. *Purday*, we think we ought not to be concluded from putting what we consider the true construction on the statutes of Anne and George III. The judgment of Lord Abinger is the only authority precisely in point, and we confess that we are not satisfied with the reasons for it, given in the report of that case.

Since then the case of *Cocks* v. *Purday* has been decided in the court of common pleas, (5 C. B. 860 ; 17 Law Journ., C. P., 273 ; 12 Jur. 677,) and followed by the courtof queen's bench in *Boosey* v. *Davidson*,[1] (*ante*, p. 574,) as we collect simply because it had been so decided, and undoubtedly we should be bound by those authorities if the question of the construction of the English statutes upon which we think the question depends had been discussed and decided in those cases.

We perfectly concur with the court of common pleas that a foreigner in amity with this country, may sue for the infringement of any of his rights — a point which we never doubted — but we thought it clear that a foreigner had no copyright in England, by the common law, that his right must depend wholly on the construction of the statutes, and if they did not give it to him, he could have no right at all ; and with respect to the construction of the statutes, we thought, if there were no binding authorities to the contrary, that the legislature did *not* mean to confer a copyright on any authors but British subjects.

We do not find that this question has been considered and decided by the court of common pleas, and the bill of exceptions having been tendered in this case with a view to carry the question to a court of error, and probably to the highest tribu-

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[1] *Boosey* v. *Davidson* was not reported at the time when this judgment was delivered.

nal, we think we ought to give the opinion which we ourselves after much consideration have formed.

Our opinion is that the legislature must be considered *primâ facie* to mean to legislate for its own subjects, or those who owe obedience to its laws, and consequently that the acts apply *primâ facie* to British subjects only in some sense of that term, which would include subjects by birth or residence, being authors, and the context or subject-matter of the statutes does not call upon us to put a different construction upon them.

The object of the legislature clearly is not to encourage the importation of foreign books and their first publication in England as a benefit to this country, but to promote the cultivation of the intellect of its own subjects, and as the act of Anne expressly states, "to encourage learned men to compose and write useful books," by giving them as a reward the monopoly of their works for a certain period, dating from their first publication.

We therefore hold that a foreigner by sending to, and first publishing his work in Great Britain acquires no copyright. A British subject who purchases from him such right as he had in his own country, which could not extend beyond it, cannot be in a better condition here than the foreigner. He does not thereby become an author: nor is it easy to see that it makes any difference in his right under the statute whether he is a purchaser from the foreigner of the whole or part of the monopoly of printing for value, or not, if the introduction of the work into England is sufficient to make him "an author," nor can any one who in Great Britain has acquired from the foreign author his supposed inchoate title to first publication, which in reality is none, be in a better condition. A British subject under such circumstances is not "an author," though if he had altered or translated the original work he might be.

We think therefore that this plaintiff has no right. With respect to the circumstance that the publication abroad and in England was not in this case exactly contemporaneous — as a publication took place at Milan a few hours before it was made in England — we conceive that this would not defeat the plaintiff's copyright here, if he had any, as the author certainly did not mean to give the work to the foreign *before* he gave it to the British public, and in no case is it intimated that to be entitled

to a British copyright the foreign author must give his work to the United Kingdom *exclusively*.

There certainly is a difficulty, as was suggested in the course of the argument, in understanding the meaning of the supposed rule, that a previous publication abroad deprives the author of his copyright in England, when the previous publication is no abandonment to the public and gives no right to any one, but is only the commencement of a monopoly abroad when published in a country where copyright exists.

But we think we must say, presuming a foreign author and his assigns to be within the acts, and to have by law a copyright, that where the author means to publish contemporaneously in England and abroad, he or his assigns are not disentitled to copyright by the actual publication in one place before the other, on the same day.

Our judgment will therefore be put on the record as the direction of the judge at *nisi prius* on both points, the one against and the other in favor of the plaintiff, and the important question involved in the case, which the parties wish to be raised, must be finally disposed of in a court of error.—*Rule accordingly*.

Recent American Decisions.

Before the Hon. John Maynard, *Justice of the Supreme Court of New York, for the Seventh Judicial District, at Auburn, Sept.* 21, 1849.

Parliament Bronson *et ux.* and Georgiana E. Wood, (an infant,) *v.* St. Peter's Church, Auburn.

A woman on the decease of her husband acquires a right *in action* merely in a church pew, and her subsequent marriage gives her second husband no interest in the pew.

The vestry of churches in communion with the Protestant Episcopal Church as trustees under the statute of New York, have the legal right to alter the church edifice.

Accordingly held in this case, where the alteration consisted in the addition of new pews in front of the plaintiffs' pew, and the removal of the pulpit and chancel sixteen to twenty feet farther off, that such enlargement was within the powers of the trustees, and a motion for an injunction denied.

Held, also, that the absolute deed of a church pew in perpetuity is only the convey-

ance of the right TO THE USE OF THE PEW DURING DIVINE SERVICE in the nature of a leasehold estate, and gives the holder no claim that the relative situation of the internal parts of the church shall not be altered; nor that the church shall remain unaltered, unless damages shall be paid or secured.

THIS was a motion for an injunction on a complaint filed by the plaintiff.

The complaint stated that the defendants' church edifice was erected in 1833, and that George H. Wood purchased pew No. 55 in said church; that he was a subscriber for the building of the church, and received the amount of his subscription in the said pew, and a deed for the same without reservation or qualification; that he was a regular attendant at the church until February, 1844, when he departed this life intestate, leaving the plaintiff, Deborah Ann his widow, and Georgiana E. his only child and heir at law, now an infant; that the plaintiff, Parliament Bronson, was married to the said Deborah Ann in August, 1845; that the former church was built in an oblong form, with the pulpit and chancel in the centre of the north end, with an aisle in front of the chancel, and running through to the wall on each side; that pew No. 55 was the *fourth* pew in number from the said cross aisle on the western wall side and pleasantly situated, and that its pecuniary value consisted essentially in its location and nearness to the pulpit and chancel.

The complaint further stated that the defendants have adopted a project for enlarging or altering the church by extending the same about twenty feet further north at the north end, and jutting out the sides of the new part so as to present the church when enlarged in the form of a cross, and with a large number of new pews between said pew No. 55 and the pulpit and chancel, which are to be removed some twenty to thirty feet farther from plaintiffs' pew and the pulpit placed on one side; that the defendants have entered upon said work, and have torn out the north end of the church, and are laying the foundation of the new part; that the plaintiffs have not consented to said enlargement, but have no objection to it, provided they can be set forward and have a clear title to the new pew, corresponding in location relatively to the pulpit and chancel with their present pew; and thereupon the complainants prayed for an injunction to restrain the Vestry of St. Peter's Church

from proceeding with the contemplated enlargement, unless and until they give satisfactory security that they will convey to the plaintiffs a new pew in the enlarged church, located at the same distance, and in the same direction from the pulpit and chancel, as their present pew.

The defendants showed by affidavits that the plan of enlargement referred to was the most judicious, and was demanded by the wants of the society, and approved by a majority of the owners of pews and attendants upon the church service.

Parliament Bronson, in person, for plaintiffs.

The plaintiffs have a legal interest in their pew as a qualified real estate, and the defendants have no right or authority to do what they are now attempting, and thereby impair the pleasantness of the pew or depreciate its value without the consent of the plaintiffs. 5 Eng. Eccl. Rep. 251; 3 Ib. 19, 20; 12 Coke's Rep. 105; *Shaw* v. *Beveridge*, (3 Hill 26); *First Bapt. Church* v. *Bigelow*, (16 Wendell, 28); *People* v. *Runkel*, (9 J. R. 147 – 156); *Trustees of First Presbyterian Church in Hebron* v. *Quackenbush*, (10 J. R. 217); *Freligh* v. *Platt*, (5 Cowen 494); *Bapt. Church* v. *Wetherill*, (3 Paige 296); *Henney* v. *St. Peter's Church*, (2 Edwards 608); *In the matter of the Brick Presbyterian Church in New York*, (3 Edwards, 155); *Dutch Church in Garden Street* v. *Mott*, (7 Paige, 77); (3 R. S. 292); *Jackson* v. *Rounseville et al.* (5 Metcalf, 127); *Howard* v. *Bridgewater*, (7 Pick. 138); *Kimball* v. *Second Cong. Par. in Rowley*, (24 Pick. 347); *Newburgh Turnpike* v. *Milner*, (5 J. C. R. 101.)

Samuel Blatchford and *Stephen A. Goodwin* for defendants.

I. The plaintiffs, Parliament Bronson and wife, have no interest in the suit. *Siglar* v. *Van Riper*, (10 Wendell, 414, and cases cited); *Wood* v. *Clute*, (1 Sanford, 199.)

II. The material facts in the complaint are charged on information and belief only. There is no averment that Pew No. 55 will be injured by the defendants' enlargement. An injunction is merely asked for by the prayer to force a compromise. (1 Barbour's Ch. Prac. 617); *Osborn* v. *Taylor*, (5th Paige, 515); *Kyle* v. *The Auburn and Rochester Railroad Company*, (Saratoga Sentinel, 1841, 2, p. 86, 87.)

III. The plaintiffs seek by an indirect mode to compel the defendants to convey to them a new pew, but do not offer a release of Pew No. 55, and could not do so if they would, inasmuch as the infant's interest cannot be released. (2 R. S. 194.)

IV. The defendants are vested with full power to make the proposed alterations in their church edifice without the consent of the owner of Pew No. 55, and the owner has no claim to compensation therefor. The plaintiffs acquired by their deed only the right to the use of the pew during divine service, and that is in subordination to the legal and statutory rights of the trustees. (Webster's Ed. Laws of N. Y., Vol. 1, p. 336, Sec. 1, 2, 3, 4; 2 R. L. 212; 3 R. S. 206, 2nd Ed.; 3 Kent's Com. 402); *Freligh* v. *Platt*, (5 Cowen, 494); *Baptist Church* v. *Witherell*, (3 Paige, 302); *First Baptist Church* v. *Bigelow*, (16 Wendell, 28); *Henney* v. *St. Peter's Church*, (2 Edwards, 608); *In the matter of the Brick Presbyterian Church in New York*, (3d Edwards 155); *Shaw* v. *Beveridge*, (3 Hill N. Y. R. 26); *Wentworth* v. *First Parish in Canton*, (3 Pickering, 344); *Gay* v. *Baker*, (17 Mass. R. 435); *Howard* v. *Parish of Bridgewater*, (7th Pickering, 137); *Fasset* v. *First Parish in Boylston*, (19th Pickering, 362); *People* v. *Runkel*, (9 J. R. 147); *Green* v. *Cady* (9th Wendell, 414); *The Dutch Church in Garden Street* v. *Mott*, (7 Paige, 77); (3 Kent's Com. 419); *Stocks* v. *Booth*, (1 T. R. 428); *Tattersalls* v. *Knight*, (1 Phillimore, 237); *Fuller* v. *Lane*, (2 Add. R. 426); *Walter* v. *Gunner*, (1 Haggard, 321); *Partington* v. *Rector, &c., of Parish of Barnes*, (2 Lee's R. 345); *Pitman* v. *Bridger*, (1 Phillimore, 324); *Blake* v. *Osborn*, (3 Haggard, 733); (Sayre's R. 177; Report to Trinity Church Vestry, by Gulian Verplank and others, 1847.)

MAYNARD, J. — Parliament Bronson and wife have no interest in the subject-matter of the action, or the relief sought, which will authorize the court to consider them parties. Mrs. Bronson's dower in the pew in question has not been assigned. She has therefore no right of possession, but a mere right in action. This, however, will have no influence upon the motion, so far as the interest of the infant plaintiff is affected.

I. I propose first, to look at the strict legal rights of the parties, and to ascertain what right each party has. The trustees

of the religious corporation called *St. Peter's Church* in Auburn, in 1833, by deed executed under their corporate seal, " granted and sold " to George H. Wood, his heirs and assigns, forever, pew No. 55 in the said church, for the consideration of two hundred and twenty-five dollars [then paid.] George H. Wood is since deceased, and the infant plaintiff, Georgiana is his only heir at law. This is the plaintiffs' legal title. It will be seen that the conveyance of the pew to Wood, the intestate, is upon its face and according to the strict legal import of its language a conveyance in fee simple absolute. But it is not claimed as conveying such an estate, but only operating by way of lease of the pew for the purpose of occupancy during divine worship, in accordance with the powers given to the trustees by statute. As a conveyance in fee this deed would be void, because the trustees had no power to grant such an estate ; they could only " demise, lease, and improve the same," &c., and have power to regulate and order the renting the pews in their churches and meeting-houses, &c. (3 R. S. 1st ed., 295, 6, section 4.)

The plaintiffs' ancestor could have acquired no right whatever to the pew, but for the benign doctrine of the common law, of carrying out and giving effect to the intention of the parties so far as that intent is consistent with the rules of law, or by applying the doctrine of *cy pres* to give effect to the intention of parties as near as possible and not violate the rules of law. Accordingly, although the grantee of the pew did not acquire the absolute property therein, yet he has such a possession that he can maintain trespass against an intruder. (3 Hill, 26.) But this right of possession in the pew holders, is " *in subordination to the more general right of the trustees in the soil and freehold. Freligh* v. *Platt*, (5 Cow. 496,) per WOODWORTH, J. But it is an interest in real estate. *First Baptist Church* v. *Bigelow*, (16 Wend. 28.) The pew holders can only enter the church by permission of the trustees, (who have power to close the church,) and for the purpose of religious worship. *People* v. *Runkel*, (9 J. R., 147, 156.) A reference to the above cases and also to the case of *Henney* v. *St. Peter's Church*, (2 Edw. 608,) and following out the principles contained in them, would seem to settle and limit the plaintiffs' *legal* rights. But the counsel for the plaintiff makes a much broader claim : 1st, by

reason of the large price paid for the pew; 2d, that the sale of the pew and price paid, were in expectation that the relative location of the internal parts of the church, (so far at least as respects the pew in question,) should not be altered. The plaintiffs certainly cannot have acquired any greater legal right by reason of the enhanced price of the pew, for there was a fair *quid pro quo*, and the plaintiff's ancestor acquired precisely what he bargained for, (like every other pew holder,) and no more.

The deed of conveyance for this pew is a contract *executed;* it contains no covenants to be performed in future; there is no stipulation that the church shall remain unaltered unless damages be paid or secured, nor have the trustees relinquished any of the rights and duties devolved upon them by statute; nor indeed have they the power to do so if they would. The purchaser then held the pew in subordination to the general rights of the trustees, without any stipulation, covenant, or agreement whatever on their part to do, or abstain from doing any act within their powers as trustees; and the purchaser took his title, whatever he had, subject to the power of the trustees "to repair and alter their churches or meeting-houses, and to erect others if necessary." (3 R. S., *supra.*)

The repairs and alteration contemplated, does not interfere with the plaintiff's pew, or with her possession of it. Every thing granted by the deed is still there, and will remain in her possession as at present without molestation. The plaintiff then has no *legal right* which the defendants are about to invade or take away, and if the value of the plaintiff's pew should be somewhat depreciated by the contemplated alteration (which is quite doubtful upon the proofs,) it is only the happening of an event which the lessee of the pew was bound to foresee, and for which he has no more reason to complain than the purchaser of a city lot would have because the surrounding proprietors should choose to exercise their legal right to remove their buildings, thereby rendering the purchaser's lot less desirable and of depreciated value. He has purchased subject to all such contingencies.

II. Let us next consider the equitable rights of the parties, for although the trustees have the absolute legal estate in the church edifice, and a strict *legal* right to make alterations, still

they are *trustees*, and as such are bound to exercise their legal powers in a reasonable manner, for the benefit of the members of their church congregation or religious society, who are their *cestuis que trust;* that is they are bound like other trustees so to perform their trusts and duties, so as to conduce to the benefit of their *cestuis que trust*, doing as little injury to them, and every of them, as may be.

As to this branch of the case, however, there is little for the court to consider. The affidavits on the part of the defendants and the admission of the plaintiff's counsel show that the contemplated alteration will be a proper and judicious improvement, necessary and beneficial to the members of the society, and in accordance with the wishes of a majority of the few owners in the church. This certainly ought to settle the question as to any *equitable* claims on the part of the plaintiff to invoke the aid of this court by way of injunction. The motion for injunction is therefore devoid.[1]

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[1] The vestry of St. Peter's Church, Auburn, having contemplated an enlargement of their church edifice, a committee of the vestry was appointed to investigate the question of the powers of the vestry, and of the rights of individual pew owners in the premises. The report of that committee was drawn up by Stephen A. Goodwin, Esq. one of the vestry. The vestry thereupon proceeded to enlarge their church edifice, upon a plan somewhat modified in form. During the progress of the work, a suit was brought against the church by one of the pew owners, and an application was made to his honor Judge Maynard of the supreme court, for an injunction to restrain the vestry from proceeding with the enlargement, until they should give the pew owner security that they would on the completion of the enlargement convey to him a pew in the enlarged edifice, having the same relative position to the pulpit and chancel that the pew owned by him then held, the plan of enlargement adopted by the vestry having been one which removed the pulpit and chancel farther from the pew. That application was successfully resisted by the vestry, and the report of Mr. Goodwin was made the basis of his argument for the vestry before the judge. We subjoin the report, which, it will be seen, contains a discussion of principles whose importance is not confined to the state of New York. On the contrary, a large number of decisions in Massachusetts and other states have been very carefully collated. The case is somewhat different from that contemplated by Rev. St. Mass., ch. 20, § 6.

Report. — The parish of St. Peter's Church, Auburn, propose to enlarge the church edifice by taking out the north end, where are situated the altar and desk, adding the length of two new windows to the building, a number of new pews between those now standing and the desk and altar, and changing the arrangement of the latter, but so as not to touch any pew, unless it be the three on each side now looking inwards, which may be faced like the rest northwardly, and also the last tier of pews in the gallery, if it shall be deemed best to curtail that.

The question is presented, whether the corporation have the power to do this without being restrained, notwithstanding the dissent of an individual pew holder, and also whether if they have, any person can recover damages of them in consequence?

The determination of these questions must depend in a great degree upon the nature and extent of the property acquired by the pew holder by his purchase of a pew in perpetuity in the church.

The pews in St. Peter's Church are granted by *number* to the grantee, his heirs and assigns, forever, without limitation, and in the simplest form of a quit claim deed, and without any designation of the manner in which the right is to be enjoyed. The parties must therefore look to the law alone as the arbiter of their rights, which must be decided upon general principles. A brief review of these principles as laid down by elementary writers and adjudicated by the courts (with a reference to the statutes,) will aid us in arriving at a correct solution of the proposed questions.

Chancellor Kent in his Commentaries, vol. 3, 402, says: "A freehold right in a pew in a church may be classed among incorporeal rights, for the right only extends to the use of the pew *for the purpose of sitting therein during divine service.* The owners of a pew cannot dig a vault under it, or erect any thing over it, without the consent of the trustees or owners of the church. It is a right subject to that of the trustees or owners of the church, who have the right to take down, rebuild, or remove the church for the purpose of more convenient worship, without making any compensation to the pew holders for the temporary interruption; though it has been held that if the church should be taken down unnecessarily, the pew holder was entitled to be indemnified for the loss of his pew. While the house remains, the right to the pew is absolute, and the owner may maintain ejectment, case, or trespass, according to circumstances, if he be disturbed in his right."

In the case of *Freligh* v. *Platt*, (5 Cowen's R. 494,) which was a suit on notes given on the sale of pews in a church, the defendant set up that the interest was one in real estate, and no order having been obtained from the chancellor under the statute to authorize the sale, that the trustees could give no title, and the notes were without consideration. Woodworth, J. held that the interest was not one in lands and did not come within the statute, and he says: "The sale of a pew in a church is not a sale of real estate within the meaning of the act. By the grant of a pew, the grantee acquires a limited *usufructuary* right only. He may use it as a pew in a house of religious worship; but has not an unlimited, absolute right. He cannot use it lawfully for purposes incompatible with its nature. The right, too, is limited as to time. If the house be burnt or destroyed, the right is gone."

Chancellor Walworth held, in the case of *The Baptist Church* v. *Witherell*, (3 Page, 302,) that the grant of a pew *in perpetuity* does not give the owner an absolute right of property as in a grant of land in fee. The grantee is only entitled *to the use of the pew for the purpose of sitting therein during divine service.* But the owner of the pew may maintain case, trespass, or ejectment according to the circumstances, if he is improperly disturbed in the legitimate exercise of his legal right *to use the pew for that purpose.*"

It was afterwards held in our supreme court, in the case of the *First Baptist Church* v. *Bigelow*, (16 Wendell, 28,) that the interest acquired in a pew was, although *limited* and *qualified* such an interest in real estate as to require a writing within the statute of frauds.

This case must not be considered as conflicting with others decided before and afterwards, as in truth it does not.

The case of *Henney* v. *St. Peter's Church in New York*, (2 Edwards, 608,) was a motion to dissolve a temporary injunction granted to restrain the trustees from pulling down the church to rebuild. The injunction was dissolved; it appearing that the increase of the congregation and the dilapidation of the old edifice made it proper. The vice chancellor, McCoun, says: "The right to a pew gives no right to the soil. It gives only a limited estate." He cites *Freligh* v. *Platt* with approbation, and continues: "Hence, in the present case, it is contended that upon a pulling down and rebuilding where the accident of time has made it necessary, the pew holder's right is gone." He does not decide that question. But he shows, as does Ch. Walworth by various citations, that in England the right in a pew is merely that of possession under the control of the church warden, except where appurtenant to particular dwelling houses. *Stocks* v. *Booth*, (1 T. R. 428); *Tattersalls* v. *Knight*, (1 Phillimore, 237); *Fuller* v. *Lane*, (2 Add. R. 426); *Walton* v. *Gunner*, (1 Haggard, 321); *Partington* v. *Rector of Parish of Barnes*, (2 Lee's R. 345); *Pitman* v. *Bridger*, (1 Phillimore, 324); *Blake* v. *Osborn*, (3 Haggard, 733); (Sayer's Rep. 177.)

A case soon after arose, *in the matter of the Brick Presbyterian Church in New York*, (3 Edwards, 155,) where the trustees applied for leave to sell the church and land, and some of the pew holders and *vault owners* dissented and opposed the application. The vice chancellor, McCoun, held that the pew holders could not object *though the vault owners might*. He refers to the law in England and shows that there, no absolute rights are acquired, and although we are differently situated in this country, yet that "it is not with us any more than it is in England a right or interest *in the soil*, which the purchaser acquires. His possession is not the possession of real estate." He proceeds, "If then such be the law as to the pew holder, even by purchase, that his interest is in the *use* of a particular seat or seats in the building, and not in the land, and that such use is limited in point of duration so long only as the church edifice shall stand, there can be no valid legal objection to the right of the trustees to pull down and remove *whenever it shall be found expedient and proper*."

The owner maintained trespass in *Shaw* v. *Beveridge*, (3 Hill's N. Y. Sup. Ct. Reports, 26,) Nelson, C. J. says: "The owners hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold. These rights are distinct and separate, neither do they nor the respective possessions growing out of them, necessarily conflict with each other."

Wentworth v. *The First Parish in Canton*, (3 Pick. 344,) was case for pulling down the meeting-house and destroying the pew. The court held on the common law, that the plaintiff could not recover. Parker, C. J. holds the following language: "It has been held in the case of *Daniel* v. *Wood*, (1 Pickering, 102,) that the property of a pew in a meeting-house is a qualified property, subject to the right of a majority of the parish, to take down or destroy the house wholly, or only in part if necessary, for the purposes for which it was erected; that is, to *repair*, *enlarge*, or *rebuild* the same when it shall have become decayed or useless. It may be so far decayed as to be unfit for use as a place of public worship, and then it may be entirely demolished and the materials may be worked into a new house, or may be sold and the proceeds go into the treasury to aid in rebuilding; and in such case no individual pew holder can claim his share of the materials or proceeds thereof, for he did not *own them but only the right of using the pew for the purpose of attending public worship*. It may be asked what remedy is there for a minority of the pew holders, if a majority shall determine to demolish the building and thus destroy the pew. We answer NONE, *if the act is necessary and proper*. In the case of *Gay* v. *Baker*, (17 Mass. R. 435,)

this right is recognized. It is there intimated, that if by reason of *altering* or *enlarging* a meeting-house, the *pew of an* INDIVIDUAL *shall be destroyed*, means should be provided for an *indemnity*, and without doubt this ought to be done in case an alteration takes place *for convenience only;* but if an entire demolition should become necessary in order to rebuild, the old house having so far decayed as to become unfit for the purpose for which it was intended, *there should seem to be no injury and no damage.*"

The same doctrine is held in *Howard* v. *The Parish of Bridgewater*, (7 Pick. 137.)

The case of *Fasset* v. *The First Parish in Boylston*, (19 Pickering, 362,) was to recover compensation for a pew alleged to have been rendered useless by the acts of the defendants. They had removed a stone wall which supported an embankment at the end of the meeting-house, and had used the same for the foundation of a new meeting-house. They had built a new meeting-house and had abandoned the old one. WILDE, J., says: "In no case can be found any intimation that a parish or religious society would subject themselves to any liability to the pew holders in consequence of abandoning their meeting-house as a place of public worship, although the pew may thereby be rendered useless. The law is the same if public worship should be wholly discontinued either in the meeting-house or elsewhere, by reason of the inability of the parish to maintain public worship, &c. It is clear that the pew holder would have no cause of complaint if the society or parish should abandon their meeting-house and wholly cease to occupy it as a place of public worship. It is admitted that the defendants had a right to abandon their old meeting-house and to build a new one. But the plaintiff's counsel contend he is entitled to compensation. He clearly has no such claim under any statute, nor are we aware of any principle of the common law on which it can be maintained."

The same general view of the rights of the pew holder is taken by GULIAN C. VERPLANCK, DAVID B. OGDEN, and SAMUEL G. RAYMOND, of New York, in an able opinion published by the vestry of Trinity Church in 1847, which may well be received as high authority upon the point, coming from two gentlemen ranking high in the profession, and from another whose opinions have ever been regarded with the greatest respect in the highest court in the state.

It is likewise a principle of law, that nothing passes as *incident* to a grant of an easement (or other incorporeal right,) but what is requisite to the free enjoyment of the privilege. (3 Kent's Com. 419.)

By the act to provide for the incorporation of *religious societies*, passed March 27th, 1801, and again enacted April 5, 1813, (Laws of New York, Webster, Vol. 1, page 336, 2 R. L., page 212, 3 Vol. R. S., 206, 2d ed.,) it is provided in relation to societies in communion with the Protestant Episcopal Church, that the church wardens and vestrymen, together with the rector of such church, shall form a VESTRY and be the TRUSTEES of such church; and such TRUSTEES and their successors shall be a body corporate, &c.

By section 4, of the same act, *the said* TRUSTEES are vested with the possession and custody of all the temporalities of said church, real and personal, with power to demise, lease, and improve the same, and also "to *repair and alter their churches or meeting-houses, and to erect others if necessary.*"

Under this act, St. Peter's Church of Auburn was duly incorporated July 1, 1805. The trustees have the possession of the temporalities of the church, whether the same consist of real or personal estate. Though they hold the property in trust for the church and congregation, still it is in their possession. *The People* v. *Runkel*, (9 J. R. 147.) They may maintain an action against a trespasser for an injury done to the meeting-house of the society. *Greene* v. *Cady*, (9 Wendell, 414.)

Viewed in the light of these authorities, the relative position of the parties is easily assigned. The TRUSTEES are the CORPORATION vested with the property in fee simple and in possession, subject to their control, with power to demise and *improve*, and to *repair* and *alter* in their discretion. The pew owners are entitled to *the use of the particular seat* or *sitting during divine service*, and to the undisturbed enjoyment of that right.

We think there can be no doubt that the vestry of St. Peter's Church, have the right to make the proposed enlargement, and that no one can by legal proceedings restrain them in this.

It is a matter referred by the statute itself exclusively to their discretion, and if a single individual member of the congregation could restrain them in the reasonable exercise of their discretion as a corporation, the statute would be effectually repealed.

In the proposed case, however, we understand the further question is presented, whether the removal of the pulpit and reading desk some pews farther off from the sitter, gives him a claim to compensation in damages for an alleged diminution in the value of the pew by this means. We think clearly not.

So long as his pew is not touched and his comfortable enjoyment of his sitting is not in truth in any way disturbed, he can have no just cause of complaint. His pew has the same value that it ever had for the purpose for which it was designed. It was no part of the original grant that the altar and reading desk should forever remain in the same spot. It might with equal propriety be claimed that the monument of Bishop Hobart, as a gratification to the eye, should not be removed, if a more desirable location could be found. The relative situation of surrounding objects either before or behind the pew, formed no part of the thing granted to the pew owner, and no part of the legal value of the pew itself. Nor can any such considerations be attached as an *incident* to the grant of such an incorporeal right as the *use of a church pew*. It is equally repugnant to sound sense and legal authority. But it has been said that the *relative value* would be diminished. If this were so, (which may well be doubted in the present case,) it would still form no answer to the exercise of an undoubted legal right. The scope of the argument reaches too far, and it would prove too much. For any addition or increase of pews either before the sitter, on the side, or behind him, would equally have that effect, and the power to alter a church would be nugatory. The question is one of legal right, and if the right exists, it is entirely immaterial whether or not such relative value is affected. The owner of large mills upon a stream may have sold lots in the vicinity. In the course of years he may remove his mills entirely, or some distance down the stream. The relative value of these lots is seriously impaired. But it would scarcely be contended that any legal claim for damages would exist. If the trustees could in a proper case demolish the church without making compensation; if they could close it, and abandon the service entirely and thus render the pew useless, surely under the absolute power to alter the church they can enlarge and increase the number of pews, when they do nothing to injure the substantial enjoyment *of the use of the pew*, nor in any way trespass upon it, or its fixtures, without being required to make compensation in damages. It is if any thing, what the law terms *damnum absque injuria*.

In the present case no such loss can ever be alleged, and the enlargement is evidently demanded by the increased size of the congregation and the interests of the church.

In regard to the pews on each side, we think the trustees have a right to turn them around so as to front northwardly and thus correspond with the new position of things, if the trustees shall deem that best. In that event, however, the

trustees would be bound to make compensation to those pew owners either in new sittings or otherwise. And this is equally true as to the private pews in the gallery if it shall be cut off. The pews may be removed or destroyed in making any repairs necessary or which are deemed expedient, subject in such a case to the right of the pew holder to just compensation.

It is perhaps desirable that the legal relations growing out of the naked purchase of a pew in a church between the holder and the trustees, should be more generally understood. It would in some cases repress individual assumptions founded in a mistaken notion of right, and in others induce the trustees to annex as conditions to the grant an equal and equitable contribution to the support of church services. The purchase of a pew, if *without condition*, cannot be held to imply any legal obligation that the purchaser shall aid in sustaining religious services in the church. Nor would such purchaser by his refusal to do so, impair or in any way violate the contract under which his pew is held. No *implied assumpsit* could be drawn from it, nor would the trustees have the power to lay an assessment *in personam* upon the pew owner, or *in rem* upon the pew: *Trustees of the First Presbyterian Congregation in Hebron, &c.* v. *Quackenbush*, (10 Johnson's R. 217.)

Nor does such purchaser acquire thereby a right to the services of the church absolutely, as they may be suspended and withheld by the trustees, as has been seen: *Fassett* v. *First Parish in Boylston*, (19 Pickering, 362.) It becomes of the greater moment that all these matters should be provided for in the outset, by such conditions and stipulations annexed to the grant of a pew, as will secure a regular and equitable contribution by rent or tax upon the pews, to sustain the services of the church.

STEPHEN A. GOODWIN,
For the Committee.

Auburn, April 3, 1849.

Abstracts of Recent English Decisions.

Court of Chancery.

Clegg v. *Fishwick*, Nov. 7, 1849. *Partnership — Equity in Renewal of Partnership — Lease obtained by Individual Partners — Laches — Pleading — Parties.* Plaintiff was widow and administratrix of C., a joint lessee and copartner with others in working a colliery, of which he was entitled to one sixth. C. died in 1836. In 1839, plaintiff assigned all intestate's "shares in collieries," to her children, in satisfaction of their claims, under the statute of distribution, but without notice to the other partners until 1849; meanwhile plaintiff joined in certain undertakings of additional property to the partnership, and continued to receive the profits of the one sixth up to 1849, when, the old colliery lease having expired, the defendants determined the partnership by notice. In 1845, some of the partners privately renewed the colliery lease, of which renewal plaintiff had notice in April, 1846. In June, 1849, she filed a partnership dissolution bill, which also prayed specifically that the new lease might be administered as partnership property, and for a revivor: — *Held*, upon

motion, to discharge an order of the court below, appointing a receiver of the plaintiff's one sixth of the profits. 1. That the plaintiff's equity was sufficiently probable to entitle her to the protection of the fund until the hearing. 2. That she was the proper party to sue in respect of the one sixth, and that her children were not necessary parties. Objection on the ground of laches also overruled. 13 Jur. 993.

De Visme v. *De Visme*, Nov. 12, 1849. *Conditions of sale — Trust — Purchase Money pending delay in completion of Contract, "from whatever cause arising."* On a sale under an order of court, in September, 1845, it was provided by the conditions of sale that the abstract of title should be delivered within three days from the confirmation of the order *nisi*, and that the purchaser should pay in his purchase money, on or before the 26th December, 1845, and be entitled to the rent as from the 25th December; but that if the purchaser should fail in making such payment at the time mentioned, "from whatever cause the delay might have arisen," he should pay interest thereon at the rate of five per cent. from that time until the payment thereof. The order confirming the order *nisi* was obtained on the 4th December, but the vendors did not deliver an abstract of the title until January 2, 1846. On the 23d December preceding, the purchaser paid the balance of his purchase money into a private bank, at £2 10*s.* per cent. interest, and gave the vendors notice to that effect on December 29. Two additional abstracts were delivered subsequently to January 2, and the title was not complete until July, 1847. The purchaser then obtained an order for payment of his purchase money, and interest at £5 per cent. from December 26, 1845, into court, and for a conveyance which was to be made without prejudice to the right, if any, of the purchaser to compensation, by reason of delay on the part of the vendors in completing the title: — *Held*, reversing the decision of WIGRAM, V. C., on a petition for compensation, that either, upon the construction of the condition of sale, the prescribed rate of interest did not begin on the events which happened, until a complete title was shown, or that the purchaser was entitled to compensation by reason of the delay of the vendors in performing their part of the contract. *Held*, also, that the purchaser must bear the loss arising from the unproductiveness of the purchase money, it being his own voluntary act to invest it. 13 Jurist, 1037. See *Esdaile* v. *Stephenson*, (1 Sim. & Stu. 122.)

Sawyer v. *Mills*, Nov. 22, 1849. *Practice — Staying Suit upon offer to pay Plaintiff's Demand.* A legatee, who had incumbered his legacy, filed his bill, before the legacy was payable, against the trustees and executors of the will, and against his own incumbrancers, alleging that the trustees had committed a breach of trust in not selling certain property; contesting, also, the claim of one of his incumbrancers, and praying that the property might be secured, that certain accounts might be taken between the plaintiff and the incumbrancer, whose claim he contested, and that, according to the result of those accounts, the legacy might be paid; and asking that the trustees might be ordered to pay the costs of the suit. The trustees admitted the breach of trust, but stated, that, the time for paying the legacy having now arrived, they were ready to pay said legacy into court upon motion now, by the defendants, the trustees, and all other

defendants interested under this will, that, upon payment by the trustees into court of the said legacy, with interest at the rate of £5 per cent., per annum, from the day the legacy became payable, and the costs of the suit up to and including the motion, the suit might be dismissed as against the defendants moving — *Held*, granting the motion, that this offer of the defendants was, in substance, giving the plaintiff all that he asked, for it gave all that by possibility could be coming to the plaintiff from the trustees of the will. 13 Jur. 1061.

Rolls Court.

Mim v. *Fenwick*, March 8, 1849.— *Marriage Settlement.* By the settlement made on the marriage of B. F. with E. C., a sum of £500 consols, was settled in trust, for the husband for life, and if the wife survived, for her absolutely; but if she died in his lifetime, leaving children then living, for all and every the children, in such shares as she should appoint by deed or will; and if there should be no children living at her decease, then over. There were seven children of the marriage, of whom five survived their mother, who had not exercised the power given to her. *Held*, that the five children who survived the mother were entitled to the fund. 13 Jur. 996.

Gregory v. *Davis*, Dec. 3, 1849. *Evidence.* In a suit against the personal representatives of D., deceased, the principal question was, at what period the partnership of D. and E. terminated; and, after publication passed, the plaintiff discovered two affidavits, one sworn by D. in another suit, the other sworn in the same suit by a witness examined for the defendant in the principal suit. On a motion by the plaintiff for liberty to examine witnesses to prove the existence of these affidavits, on the ground that the affidavit of D. tended to prove the existence of the partnership at a particular period, which was a fact in issue, and that the affidavit of the witness might contradict his evidence, if read for the defendant at the hearing, leave was given to exhibit an interrogatory to prove the affidavit of D., without prejudice as to the admissibility of the affidavit, with liberty for the defendant to cross-examine; but it was refused, as to the affidavit of the witness, on the ground, that, if the object was to discredit his testimony, the plaintiff ought to proceed in the ordinary course for that purpose. 13 Jur. 1020.

Lomax v. *Lomax*, Dec. 18, 1849. *Exoneration of personal estate.* A testator directed his executors to pay his personal expenses and debts, except a mortgage thereinafter provided for, out of certain parts of his personal estate; and in a subsequent part of his will he recited, that his T. estate was subject to a mortgage of £6000, which he was intending to pay off, and he directed any balance of the debt which should remain unpaid at his death to be paid by sale of timber and other property, and also of part of the timber on the T. estate. The testator also gave certain annuities, which he charged on his N. estate, giving to one annuitant £10 a year, or £5 and his tenement at the lodge on the N. estate. The testator did not pay off any part of the £6000 mortgage. *Held*, that his personal

estate was not exonerated from payment of the mortgage debts, but that it was exonerated from payment of the annuities. 13 Jur. 1064.

Rodick v. *Gandell*, Nov. 13, 1849. *Equitable assignment.* G. & B., partners, having overdrawn their balance at their bankers, £3000, agreed to give a security to the bank, by assignment of debts owing to them, as engineers, from certain railway companies, and to pay them into the bank, and to write to the bank to that effect. Accordingly V. & W. wrote to the bank to the effect that they would pay the moneys, when received, into the bank. The manager of the bank thereupon wrote to V. & W., acknowledging their letter, as guaranteeing the payment into the bank of all moneys received by V. & W. for G. & B., and stating the amount of the balance then due, and that, on payment thereof, V. & W.'s letter should be given up:—*Held*, that this transaction did not amount to an equitable assignment to the bank of the debts due from the railway companies. 13 Jur. 1087.

Vice-Chancellor of England's Court.

Berwick v. *Murray*, Nov. 17, 1849. *Production—Restraint.* The answer denied the plaintiff's title to certain money in a bank, but admitted the possession of a receipt, without which the defendant could not get the money from the bank — *Held*, on motion for production of documents, that this receipt must be left in court. 13 Jur. 997.

Pearcy v. *Dicker*, Nov. 20, 1849. *Proof of mark of — Creditor's Suit — Misjoinder.* An affidavit that P. was a marksman, and that a certain mark was his mark—*Held*, sufficient proof of his signature.

Where, in a suit instituted by their creditors, it was objected that one of the plaintiffs had not proved his debt, the court will not favor such an objection. 13 Jur. 997.

Glendon v. *The Hull Glass Company*, Nov. 17, 1849. *Company—Directors—Acquiescence.* The directors of a company purchased a patent, and at a meeting of the company, the purchase was reported and approved of. The patent proved unprofitable, and the directors were censured for mismanagement—*Held*, that the company must make good to the directors their liabilities in respect of purchase. 13 Jur. 1021.

Bell v. *Bell*, July 27, 1849. *Insolvency.* One of the creditors of an insolvent died, leaving the insolvent one of his next of kin—*Held*, that the insolvent's share of the personal estate must be paid to the assignees of the insolvent, without any retainer on account of the insolvent's debt. 13 Jurist, 1040.

Hughes v. *Morris*, Dec. 4, 1849. *Jurisdiction—Admiralty Court.* A. contracted for the purchase of shares in a vessel, and paid part of the purchase money to P., and obtained possession of the vessel, but no bill of sale was executed. The registered owners alleged that P. was not their agent to receive the money, and arrested the vessel in the admiralty court, and threatened to sell the shares. They were restrained from selling, or proceeding in the admiralty court. 13 Jur. 1065.

Re Bayliss, Dec. 8, 1849. *Will—Construction—Future Tense.* A testatrix gave money to the children of her brother B., living at his decease, and gave benefits to other nieces, some married and some not, and afterwards directed that "the legacies of such of my nieces as are married shall be to their separate use." One of the daughters of B. was unmarried at her death, but was married at the death of B.—*Held*, that the daughter took her separate use 13. Jur. 1090.

Vice Chancellor Knight Bruce's Court.

Smith v. *North*, April 19, 1849. *Right of retainer — Executor.* An executor, who has renounced probate of a will, is not entitled to retain a debt, due to him from the testator, out of assets in his hands. 13 Jur. 998.

May v. *Grave*, June 5, 1849. *Will — Construction — Unreceived Dividends — "Ready money."* A testator gave all his ready money to his widow. He had three half years' dividends at the bank, for which he had not received the dividend warrants — *Held*, that the unreceived dividends did not pass by the words "ready money." 13 Jur. 1021.

Powell v. *Hall*, May 24, 1849. *Pleading—Cross Bill—Demurrer.* A cross bill was filed for discovery, adding new facts destructive of the case made by the original bill, and praying general relief; and the same was held not to be demurrable. 13 Jur. 1042.

Bunbury v. *Bunbury*, April 30, 1849. *Will — Construction — Residue — Revocation.* A testator, by his will, gave the residue of his real and personal estate to his wife absolutely. By a codicil, he bequeathed some share compensation money to his wife, upon certain trusts as to half; and as to the residue thereof, "together with all sum and sums of money, estate, and effects" which he might die possessed of or interested in, save and except the other moiety of the compensation-money thereafter mentioned, upon trust to receive the dividends arising from the investment thereof, for her life; and after her death, he bequeathed said moneys and securities, in or upon which the same should be invested, to other parties: *Held* that, as it was not clear that the testator did not intend by the codicil to take away the rights conferred on his wife by the will, it was reasonably doubtful that he did so intend, and that, therefore, she was entitled, as residuary legatee, absolutely, and not for life only. 13 Jur. 1091.

Vice-Chancellor Wigram's Court.

White v. *Pearce*, July 14, 1849. *Solicitor's lien for costs.* By the decree in a cause, certain of the defendant's estates were decided to be sold to meet the plaintiff's claim. Pleading the preliminaries for a sale, the plaintiff's solicitors gave notice to the defendant that they claimed a lien against the plaintiff in respect of their costs. The suit was afterwards compromised, the defendant paying a certain sum to the plaintiff,— *Held*, upon petition of the plaintiff's solicitors, that they were entitled to be paid

their taxes, costs of suit, and of the petition, by the plaintiff and the defendant, or one of them, not exceeding in the whole the sum paid by the defendant upon the compromise. 13 Jur. 999.

Waddilove v. *Taylor*, July 26, 1849. *Payment of money out of court under general authority to solicitor.* A general written authority was given by a party, out of the jurisdiction, to a solicitor in this country, to take any proceedings in a suit in chancery that might become necessary for obtaining payment of his share of the fund in the suit, out of court—*Held*, upon petition presented by the solicitor in the name of the party, not to authorize payment of the share to the solicitor. 13 Jur. 1023.

Duke of Beaufort v. *Morris*, Dec. 17, 1849. *Practice where action directed to law fails in deciding the question for the trial of which it was directed.* In a suit for an injunction, the court directed an action to be brought to try the legal right, and that on the trial certain admissions should be made by the defendant. Upon appeal, the lord chancellor varied the order, by directing the admissions to be struck out. The action was then tried without the admissions, but failed, in consequence of the defence set up, as a trial of the question of right. A petition to the court below, to have another proceeding directed to a court of law to try the question of right, was dismissed, with costs, with liberty to the petitioner to apply to the lord chancellor for such order, as he might think ought to be made, without a rehearing, or for a rehearing, if that were necessary. 13 Jur. 1068.

Court of Queen's Bench. Trinity Term.

Forth v. *Simpson*, May 23, 1849. A trainer of race-horses has no right of lien in respect of the labor and skill expended upon a race-horse, where the owner may send the horse to run at any race he may choose, and appoint the jockey to ride it. 13 Jur. 1024.

Sittings in Banc after Trinity Term.

Hutchinson v. *Shipperson*, July 5, 1849. At the commencement of proceedings before an arbitrator, the defendant admitted the plaintiff to be entitled to a certain sum; the arbitrator, misconceiving what was said, thought the sum was stated to be no matter in difference, and omitted to give the plaintiff credit for it—*Held*, in exception to the general rule, that the mistake of an arbitrator is no ground for setting aside an award. 13 Jur. 1098. [See *Hall* v. *Hinds*, (2 M. & G. 1847); *Hagger* v. *Baker*, (14 M. & W. 9); Contra *Phillips* v. *Evans*, (12 M. & W. 309).]

Michaelmas Term.

Freeman v. *Steggel*, Nov. 5, 1849. A deed given in evidence by plaintiff under a judge's order, had an interlineation in a material part, which was not noticed in the attestation—*Held*, that defendant was precluded from objecting, that the interlineations should be shown to have been made before the execution of the deed. 13 Jur. 1030.

Court of Common Pleas. Sittings in Banc after Hilary Term.

Mayhew et al. assignees v. *Herrick, Trover—Partner—Sheriff's Sale—Conversion—Evidence.* One partner cannot maintain trover against the sheriff for a mere sale of his share of the partnership property under a *fi. fa.* issued against the other partner for a separate debt. The sheriff in such case is in the same position, so far as regards his liability in trover, as if the sale had been by the execution partner; and upon a plea of not guilty the partnership is good evidence. 13 Jur. 1078.

Sittings in Banc after Trinity Term.

Wright v. *Coles*, June 25, 1849. *Agreement — Failure of consideration — Money had and received — Evidence.* In an action for breach of agreement to grant a lease, the first count of the declaration set out the agreement, by which after reciting that the defendant had, as he was advised, legally put an end to a certain lease granted to one S. H., of a certain farm, by entering thereon under the power contained in the said lease, by reason of the bankruptcy of the said S. H., the defendant agreed to grant the plaintiff a lease of said farm, at a certain yearly rent, payable quarterly. Said lease to commence at a fixed time, if the defendant could then legally make and execute the same, or as soon as the defendant should be in a situation to grant the same, the yearly rent to commence from the commencement of the term, or on possession being given, which should first happen; and it was agreed that the plaintiff should pay down to the defendant, on possession being delivered to him of said farm, the sum of £500, as a *bonus* or premium for said lease, so to be granted. The count then alleged mutual promises, and averred the delivery of possession to the plaintiff under the agreement, and, on such delivery, payment by the plaintiff to the defendant of £250, in part payment of said £500; and after stating that a reasonable time for granting the lease had elapsed, and that the defendant was in a situation to grant and could legally make such lease, assigned for breach that the defendant did not and would not grant to the plaintiff such lease. Second count — money had and received. Pleas: first, non assumpsit; thirdly, to the first count, a traverse of the payment of £500; fourthly, to the same count, a traverse that the defendant was able to grant the lease; and, fifthly, to the same count, a traverse that a reasonable time had elapsed — *Held*, that though the recital at the commencement of the agreement was *primâ facie* evidence that the defendant had power to grant the lease, yet, as the recital showed such power to be on the supposed bankruptcy of S. H., this *primâ facie* case was answered by proof that the bankrupt commission against S. H. had been superseded. *Held also*, that the granting of the lease was the consideration for which the *bonus* was to be given, and that therefore, such lease not having been granted, the money paid in part payment of said *bonus* might be recovered back on the count for money had and received, although the plaintiff had occupied the farm for two years. *Quære*,

whether the payment of the *bonus* was a condition precedent to the granting of the lease? 13 Jur. 1056.

Michaelmas Term.

Hicks v. *Gregory*, Nov. 24, 1849. *Consideration — Annuity to the Mother of an Illegitimate Child.* The father of an illegitimate child wrote to the mother, saying, "As I always promised that you and your child should never want, I will allow £100 a year for your life and little Emma's, to begin from" &c., "which I think will be sufficient to keep you in great comfort. . . . . Of course, if I hear of your behaving, or bringing up your child, improperly, I will stop the allowance to you; but I am sure you never will" — *Held*, that the child having been properly maintained by the mother, there was a valid consideration for the promise. (WILLIAMS, J. *dubitante.*) 13 Jur. 1031.

Crown Cases Reserved. Court of Criminal Appeal. Michaelmas Term.

Regina v. *Thristle*, Nov. 20, 1849 *Larceny — Animus furandi — Dishonest appropriation of Chattel.* A watch maker, to whom a watch had been confided by its owner for the purpose of being regulated, disposed of the watch and applied the proceeds to his purposes — *Held*, that this was no larceny, as the watch maker had in the first instance obtained possession of the watch rightfully, and as, unless there was a taking in the first instance *animo furandi*, no subsequent dishonest dealing with the chattel could amount to larceny. 13 Jur. 1031.

Prerogative Court.

In the goods of *G. Collins*, Nov. 17, 1849. A solicitor, in instructions for a will, described a legatee as "John" instead of "William," and was informed of his mistake by the deceased, John, the person named having been long dead. The instructions were executed as the will, the mistake remaining unaltered — *Held*, on motion, that the name "William" could not be substituted for that of "John." 13 Jur. 1108.

In the goods of *The Dowager Countess of Morton*, Dec. 5, 1849. The deceased substituted, for an original sheet in her will, one in her own hand-writing — *Held*, on motion, that in the absence of evidence, the reasonable presumption arising from the circumstances of the case was, that the substitution was made before execution. Probate decreed of the will with the substituted sheet. 13 Jur. 1108.

Notices of New Books.

REPORTS OF CASES DETERMINED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE, with some Opinions of the District Judge in Cases determined in the Circuit Court, 1839–1849, by EDWARD H. DAVEIS, Counsellor at Law. 8vo. Portland, 1849.

IN our last number we had only space sufficient to notice the appearance of this valuable addition to judicial learning. On a more careful examination we find that the volumes contain six cases arising under the United States bankrupt act; and, as that act is no longer in operation, the reporter has, (as he informs us in the preface) judiciously omitted all the cases of this class except these few, which present points of general application. All the other cases, except eleven, are admiralty decisions — and as such we are happy to see that the present volume fully sustains the reputation for learning and ability which the previously published decisions of the same court by the same learned judge had already won. In respect to its sea-coast and the number of its bays and harbors, Maine ranks before all other states in the Union, and from official returns made to the secretary of the treasury, it appears that the number of vessels built the last year in this state is greater than in any other, and equal to nearly one third of the whole number built in the United States.

Here, then, we might expect to see the laws relating to the rights and duties of ship owners and seamen, and contracts growing out of the use of shipping, defined and explained. In this expectation we are not disappointed, for not only have the lights of modern jurisprudence relating to maritime affairs been abundantly poured upon the pages of the present work, but occasionally the sources and fountains have been explored with rare diligence and success. As an illustration of this remark the reader need only to turn to the note commencing on the 144th page, in which are discussed the relative claims of the judgments of Oleron and the Consulate, to the merits of seniority.

It may be in part owing to the fact that courts of admiralty do not administer the common law, and consequently are freed from the use of many of the technical terms and barbarous phrases peculiar to it, or it may be owing to other causes, — but since we read the masterly opinions of Lord Stowell in Robinson's Reports, scarce knowing which most to admire, the high moral principle and broad equitable views upon which admiralty courts proceed, or the classic purity and elegance of style in which their opinions are expressed, we have always felt that in literary excellence the common law reports fall far short of their maritime rivals. We do not wish to revive the ancient quarrel between common law and admiralty courts, but we think all law students of the present day, will be delighted with the way in which Lord Coke, in a marginal note to the 109th page, is castigated for his hostility to admiralty jurisdiction.

In another note at the end of the case of the Huntress, there is a very able defence of the jurisdiction of admiralty courts over cases of contracts for the transportation of goods on the sea, as maritime contracts.

In this note, the (learned) reader will perceive, the point is discussed which was decided in the 6th Howard's Supreme Court Reports, page 344, in the case of the *New Jersey Steam Navigation Company* v. *The Merchant's Bank;* and we feel that we are certainly speaking within due bounds when we say that the research, learning, and ability brought to bear by the court which holds its sessions at Wiscasset and Portland, are not surpassed by that learned tribunal which annually assembles at Washington.

We are peculiarly gratified with the learned exposition of admiralty principles and practice contained in this volume and its predecessor, as since the passage of the act of congress of February 26, 1845, extending the jurisdiction of the district courts of the United States to cases upon the lakes and the navigable waters connecting the same, and the rapidly increasing commerce which has sprung up on our distant Pacific coast, this important branch of law will be felt in its liberal and beneficent operations wherever the tide ebbs and flows on our almost unlimited sea-coast, or wherever upon our inland seas the white sails of our vessels or the smoke of our steamers, show that traffic and commerce administer to the conveniences and necessities of civilized life. Let the foundations of this branch of our jurisprudence now be laid broad and deep, for they are to last as long as winds blow and waters flow.

Miscellaneous Intelligence.

To the Editor of the Monthly Law Reporter:

In the report of the case of *Merritt* v. *Sackett*, contained in the last number of your ably edited and valuable periodical, there is a material error which I should be glad to see corrected. The report was hastily prepared and printed in the newspaper from which it was copied by you, merely for the purpose of local information. Several typographical errors occurred; but the error to which I have referred was occasioned by inadvertence in preparing the manuscript. The abstract at the head of the report is in these words: "The jurisdiction of the court of an action *in personam* in favor of material-men doubted, and its exercise declined." The error referred to consists in representing the decision as applicable to all cases of the kind specified, instead of restricting it to cases like that before the court, *of supplies furnished in a home port*. The judgment, indeed, is sufficiently explicit on this point, but may not be read by one in five of those who will read the abstract. The decision rests mainly on the 12th of the rules prescribed by the supreme court to regulate proceedings indiscriminately, and I am the more anxious that it should not appear, even to the cursory readers of the Reporter, more comprehensive than it really is, because I am by no means confident that I have not erred in ascribing undue importance to the rule in question, and refusing to exercise jurisdiction in the case before me. The only object of the rule, however, appears to be, to declare the remedies to which material men shall have a right to resort in the admiralty: and while in the case of foreign ships it specifies an action *in personam* as well as *in rem;* in the case of

domestic ships (where a lien is given by the local law,) it indicates only an action *in rem*.

I avail myself, also, of this opportunity to place myself in a just attitude touching another decision of mine which appeared in the last June number of the Reporter, (p. 90,) and made in conformity with what appeared to me to be the unavoidable interpretation of the language of the supreme court of the United States, in the case of *Fox* v. *The State of Ohio*, 5 Howard's R. 410, relative to the jurisdiction of the national and state courts, of the offence of passing counterfeit coin. In the preceding January number of the Reporter, (p. 400,) there is the report of a decision by the judge of the United States for the Western District of Virginia, upon the same question; of which decision no notice whatever is taken in the above-mentioned judgment pronounced by me. The date of my own decision does not appear in the report, and its publication so long after the appearance of that of Judge Brockenbrough, would seem to warrant the inference that I had probably seen the report of his elaborate, well-reasoned, and obviously well-considered judgment, and that I had designedly passed over it in silence.

It is these inferences that I desire to counteract. In reality my decision was made long before it was published, and it so happened, also, by some unaccountable oversight, that I did not read that of Judge Brockenbrough until some months afterwards. Had I done so before the question arose in this district, although the reasons by which the learned judge has so ably fortified his conclusion might have failed to convince me, the respect justly due to his opinion might and probably would have sufficed to reconcile me to the further exercise of a power, the existence of which he frankly admits it to be difficult to reconcile with propositions enunciated by the supreme court.

I am, with great respect, &c. &c.

A. Conkling.

Melrose, near Auburn, N. Y., Feb. 13, 1850.

P. S. In the printed report of the case last above-mentioned, I am erroneously represented to have said, "and the whole subject being thus committed *reasonably* to the discretion of congress," instead of *measurably*.

Important Decisions of the Supreme Court of Massachusetts. The Supreme Court have recently pronounced decisions at Dedham, (February term, for Norfolk) in two cases of great practical importance, which were argued at the Law Term, in October, 1849. In one of these (*Marshall et al.* v. *Bayley et al.*) it was decided, that under the Revised Statutes, a petition for partition may be maintained by a party who has been ousted. Sundry decisions to the contrary were referred to, which were made previous to the Revised Statutes, but these were held to be inapplicable on account of the change in the language of the statute. It was objected that the effect of such a decision would be to give to the petitioner the benefit of all improvements. But it was held, that the statute made no provision for betterments, and therefore the petitioner was entitled to the improvements.

In the other case, (*Cynthia J. Morse*, appellant from decree of judge of probate) it was held, that a devise of real estate, made by a married woman, who held the same in her own right, to her husband was void. The stat. 1842, ch. 74, was relied upon by the husband, but it was contended for the heir at law, that the first proviso in said statute renders it impossible for such a devise to be made in favor of a husband, inasmuch as it "*affects the rights and interests of the husband*," by enlarging the same. In this case no opinion of the court has been written out, but we presume the position taken by the counsel for the heir at law was sustained, as the court reversed the decree of the judge of probate, who had admitted the will to probate, and the heir at law appealed. As soon as we can procure authentic reports of these cases, we shall be glad to publish them at length. We give the points decided, at this early date, in order that the legislature now in session, may modify the statutes on which these cases were decided — if they think the present statutes need an alteration.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Ainsworth, Luther	Chicopee,	Jan. 29,	George B. Morris.
Austin, Joseph W.	Lowell,	" 3,	Asa F. Lawrence.
Baker, Cyrus	Worcester,	" 28,	Henry Chapin.
Blood, Cyrus	Woburn,	" 17,	Asa F. Lawrence.
Bornstein, Isaac	Boston,	" 11,	J. M. Williams.
Boynton, Nathaniel P.	Lynn,	" 23,	John G. King.
Bradley, Levento	Methuen,	" 1,	John G. King.
Brigham, Daniel	Marlboro,	" 21,	Asa F. Lawrence.
Brown, Joseph. Jr.	South Scituate,	" 9,	Welcome Young.
Brown William H.	Chicopee,	" 2,	George B. Morris.
Buntin, Robert	Boston,	" 30,	J. M. Williams.
Cannon, Benjamin F.	Wendell,	" 15,	D. W. Alvord.
Chase, John H. et al.	Lowell,	" 5,	Asa F. Lawrence.
Clark, Appleton P.	Boston,	" 22,	J. M. Williams.
Colby, John.	Boston,	" 16,	J. M. Williams.
Cowell, Pardon	Warren,	" 30,	Henry Chapin
Dalton, Eleazer M.	Salem,	" 7,	John G. King.
Davenport, Oliver G.	Natick,	" 25,	Asa F. Lawrence.
French, Samuel A. et al.	Boston,	" 11,	J. M. Williams.
Gregory, Joseph, et al.	Lowell,	" 5,	Asa F. Lawrence.
Hall, Henry A. et al.	Boston,	" 30,	J. M. Williams.
Hooper, John	Lawrence,	" 22,	John G. King.
Jewett, Isaac S.	Tewksbury,	" 5,	Asa F. Lawrence.
Lane, William, Jr.	Rockport,	" 15,	John G. King.
Lane, John S. W.	Cambridgeport,	" 16,	Asa F. Lawrence.
Loomis, James M.	Springfield,	" 12,	George B. Morris.
Moulton, Andrew	Littleton,	" 4,	Asa F. Lawrence.
Neal, Jonathan	Lowell,	" 9,	Asa F. Lawrence.
Parker, Joshua	Stow,	" 24,	Asa F. Lawrence.
Pearson, Henry et al.	Boston,	" 14,	J. M. Williams.
Perkins, Enoch W.	Boston,	" 16,	J. M. Williams.
Phelps, Henry,	Westfield,	" 1,	George B. Morris.
Pitcher, Edward	"	" 10,	George B. Morris.
Prevost, Louis L. J.	Worcester,	" 9,	Henry Chapin.
Rich, Timothy	Medford,	" 21,	Asa F. Lawrence.
Robinson, Fred'k R. et al.	Boston,	" 30,	J. M Williams.
Smith, Erastus T.	Holliston,	" 31,	Asa F. Lawrence.
Souther, Charles N.	Lawrence,	" 26,	John G. King.
Wall, Thomas	West Springfield,	" 7,	George B. Morris.